

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 465

ROBERT B. HONEYMAN, APPELLANT,

vs.

DAVID B. JACOBS AND MARY V. JACOBS

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED NOVEMBER 8, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 465

ROBERT B. HONEYMAN, APPELLANT,

vs.

DAVID B. JACOBS AND MARY V. JACOBS

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

INDEX.

	Original	Print
Record on appeal to Court of Appeals of New York.....	a	1
Remittitur of Court of Appeals.....	a	1
Notice of appeal to Court of Appeals.....	1	2
Order appealed from	3	3
Notice of motion to confirm referee's report of sale and for deficiency judgment.....	5	4
Affidavit of Robert B. Honeyman.....	7	5
Referee's report of sale.....	10	7
Summons	15	10
Complaint	16	11
Notice of appearance and demand by defendants David B. Jacobs and Mary V. Jacobs.....	25	17
Judgment of foreclosure and sale	26	17
Affidavit of David B. Jacobs.....	34	23
Affidavit of Arthur Butler	37	25
Opinion, Lockwood, J.....	40	27
Stipulation waiving certification	40	27
Bond on appeal to Supreme Court of the United States (omitted in printing)	41	
Citation	44	
Order allowing appeal	45	27
Petition for appeal	47	28
Opinion, per curiam, Court of Appeals.....	51	31
Stipulation as to transcript of record.....	53	33
Assignments of error.....	54	33
Order on remittitur	56	34
Judgment on remittitur	57	35
Statement of points to be relied upon and designation as to printing record	58	36

[fol. a] **IN COURT OF APPEALS OF NEW YORK**

Witness the Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

ROBERT B. HONEYMAN, Appellant,
ag'st

ALMA CLAIRE CLARK, Ind., &c., Impld. With DAVID B. JACOBS, & Ors., Respondents

REMITTITUR—October 19, 1938

Be it Remembered, That on the 26th day of September, in the year of our Lord one thousand nine hundred and thirty-eight, Robert B. Honeyman, the appellant in this cause, came here unto the Court of Appeals by David R. J. Arnold, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Supreme Court. And David B. Jacobs & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Sobel & Brand, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this [fol. b] cause argued by Mr. Robert B. Honeyman, of counsel for the appellant, and no appearance having been made by counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Supreme Court appealed from herein be and the same hereby is affirmed without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be

enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS,

Clerk's Office

Albany, October 19, 1938.

I, Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 1] IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

ROBERT B. HONEYMAN, Plaintiff-Appellant,
against

ALMA CLAIRE CLARK, Individually, and as Executrix under the Last Will and Testament of Annie E. Poth, Deceased;
David B. Jacobs, Mary V. Jacobs, His Wife, et al., Defendants-Respondents

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS:

Please take notice that the plaintiff hereby appeals to the Court of Appeals of the State of New York from the judgment or order of the Supreme Court of the State of New York, County of Queens, duly entered and filed in the Office of the Clerk of the County of Queens on the 7th day of September, 1938, finally determining that in a foreclosure action plaintiff is not entitled to judgment for the deficiency reported by the Referee, or any judgment for deficiency by [fol. 2] reason of the fact that the value of the property is equal to the amount of the debt due plaintiff, and that under § 1083-a of the Civil Practice Act the plaintiff is deemed paid as matter of law; the § 1083-a being held to be constitutional. The only question involved on the appeal is

the validity of a statutory provision of the State of New York, under the Constitution of the United States.

Dated, New York, September 14th, 1938.

Yours, etc., David R. J. Arnold, Attorney for Plaintiff,
No. 61 Broadway, Borough of Manhattan, New
York City.

To The Clerk of the Supreme Court of the State of New York, County of Queens. Sobel & Brand, Esqs., Attorneys for Defendants Jacobs.

[fol. 3] IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

Present: Hon. Charles C. Lockwood, Justice.

ROBERT B. HONEYMAN, Plaintiff,
against

ALMA CLAIRE CLARK, Individually, and as Executrix under the Last Will and Testament of Annie E. Poth, Deceased; David B. Jacobs, Mary V. Jacobs, His Wife, et al., Defendants

ORDER APPEALED FROM—September 2, 1938

The above named plaintiff having moved this Court, by Notice of Motion dated June 2nd, 1938, for an order confirming the report of Edward T. Shannon, Referee, and directing a deficiency judgment to be entered herein in favor of the plaintiff and against the defendants, David B. Jacobs and Mary V. Jacobs, in the sum of Nine Thousand Five Hundred and Ninety Dollars (\$9,590.00), the amount of the deficiency as reported by the said Referee in and by his report, with interest, and the said motion having duly [fol. 4] and regularly come on before this Court to be heard on June 10th, 1938, and the plaintiff in person having appeared in support of the said motion, and Sobel & Brand, Esqs., attorneys for the defendants, David B. Jacobs and Mary V. Jacobs, by Stanley R. Wayne, of counsel, having appeared in opposition thereto, and the sole question raised by the parties hereto on this application being the constitutionality of Section 1083-a of the Civil Practice Act of the State of New York;

Now, on reading and filing the Notice of Motion, dated June 2nd, 1938, the affidavit of Robert B. Honeyman, duly sworn to June 2nd, 1938, and the report of the Referee, in support of said motion, and the affidavit of David B. Jacobs, duly sworn to June 7th, 1938, and the affidavit of Arthur Butler, duly sworn to June 7th, 1938, in opposition thereto, and the Court having rendered its decision, in writing, on the 22nd day of June, 1938;

Now, on motion of Sobel & Brand, attorneys for the defendants David B. Jacobs and Mary V. Jacobs, it is

Ordered that the motion to confirm the report of the Referee herein be and the same hereby is granted, and it is further

Ordered that the plaintiff's application for a deficiency judgment against the defendants David B. Jacobs and Mary V. Jacobs in the sum of Nine Thousand Five Hundred and Ninety (\$9,590.00) Dollars, being the amount of deficiency as reported by the Referee in his report, or in any other sum, [fol. 5] be and the same hereby is in all respects denied on the grounds that the value of the property is equal to the debt of the plaintiff, and pursuant to Section 1083-a of the Civil Practice Act of the State of New York, limiting deficiency judgments, the plaintiff is deemed paid as a matter of law, which section is hereby held to be constitutional.

Enter.

C. C. L., J. S. C.

Entered 9-7-38.

IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

[Same title]

NOTICE OF MOTION TO CONFIRM REFEREE'S REPORT OF SALE
AND FOR DEFICIENCY JUDGMENT

Please take notice that upon the Referee's Report of Sale herein dated May 24, 1938, and filed in the office of the Clerk of the County of Queens on the 26th day of May, 1938, a copy of which report has heretofore been served upon you, with notice of filing, and upon the proceedings heretofore had herein and upon the annexed affidavit of the plaintiff, verified the 2nd day of June, 1938, a motion will be made at a Special Term of this Court for the hearing of Motions to be

held in Justice's Chambers at the Chamber of Commerce Building, 89-31 161st Street, Jamaica, Queens County, New York, on the 10th day of June, 1938, at 10 o'clock A. M., [fol. 6] or as soon thereafter as counsel may be heard, for an order confirming the Referee's Report of Sale in this action in all respects, and also for an order directing a deficiency judgment to be entered herein in favor of the plaintiff and against the defendants, David B. Jacobs and Mary V. Jacobs, in the sum of Nine Thousand Five Hundred and Ninety Dollars (\$9,590.), the amount of the deficiency as reported by the Referee in and by his said report, with interest thereon at 6% from May 24, 1938.

Dated, June 2, 1938.

Yours, etc., David R. J. Arnold, Plaintiff's Attorney,
61 Broadway, New York City, N. Y.

To Sobel & Brand, Esqs., Attorneys for Defendants,
David B. Jacobs and Mary V. Jacobs, 170 Broadway, New
York City, N. Y.

[fol. 7] IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

[Same title]

AFFIDAVIT OF ROBERT B. HONEYMAN, READ IN SUPPORT OF
MOTION

STATE, CITY AND COUNTY OF NEW YORK, ss:

Robert B. Honeyman, being duly sworn, deposes and says, that he is the plaintiff in the above entitled action.

That this action is founded upon a bond made, executed and delivered by David B. Jacobs and Mary V. Jacobs on the 4th day of February, 1928, to the Title Guarantee and Trust Co., a New York corporation, to secure the payment of the sum of Fifteen Thousand Dollars (\$15,000) on the 4th day of February, 1931, with interest at the rate of six per centum (6%) per annum, as collateral security for the payment of which said bond the said David B. Jacobs and Mary V. Jacobs executed and delivered a mortgage upon certain premises at the Southeast corner of Central Avenue and Seneca, or Beach 12th Street, Far Rockaway, Queens County, Long Island, New York.

That the complaint asks for foreclosure of said mortgage and the sale of the mortgaged premises and for judgment

for any deficiency against the said David B. Jacobs and Mary V. Jacobs.

That the summons and copy of the complaint were served upon the said David B. Jacobs and Mary V. Jacobs, and they duly appeared in the action by Sobel & Brand, their attorneys, 170 Broadway, Borough of Manhattan, New York City, New York, and demanded notice of all proceedings.

[fol. 8] That thereafter such proceedings were had that judgment of foreclosure and sale was duly entered, wherein it was provided; among other things, that plaintiff might apply in this action for leave to enter a deficiency judgment against the said defendants, David B. Jacobs and Mary V. Jacobs.

That, as appears from the Referee's Report of Sale filed in the Office of the Clerk of this Court on the 26th day of May, 1938, said mortgaged premises were duly sold by the Referee duly appointed for that purpose at public auction on the 19th day of May, 1938, in all respects in accordance with the statutes and practice of this Court, for the sum of Seventy-five Hundred Dollars (\$7500), that being the highest sum bidden therefor.

That the Referee, as appears from his report, paid out of the proceeds the sum of Six Hundred Sixty-three and 38/100 Dollars (\$663.38), taxes which were a lien at the time of the sale; and that out of said proceeds there were also paid or deducted or allowed the sum of One Hundred Dollars (\$100), the Referee's fees; One Hundred Twenty-seven and 40/100 Dollars (\$127.40), advertising said sale; and Two Hundred and Eighty-eight and 25/100 Dollars (\$288.25) costs, and Two Hundred Dollars (\$200) allowance, awarded to plaintiff by the judgment.

That the Referee thereafter duly made, executed and delivered to the purchaser a deed of conveyance of said premises and filed his report setting forth the disbursements and allowances paid by him under the authority of the judgment of foreclosure and sale, and reported that there was due to the plaintiff the sum of Nine Thousand Five Hundred and Ninety Dollars (\$9,590), with interest from the date of his report, to wit, May 24, 1938, as a deficiency. Deponent asks that said Report be in all respects confirmed.

[fol. 9] Plaintiff alleges that under and in accordance with the law of his contract with the defendants, David B.

Jacobs and Mary V. Jacobs, he is entitled to a judgment against the said defendants, David B. Jacobs and Mary V. Jacobs, in the sum of Nine Thousand Five Hundred and Ninety Dollars (\$9,590).

And plaintiff further alleges that by the laws of 1933, Chapter 794, and various other acts supplemental and amendatory thereto, the legislature of the State of New York has attempted to limit deficiency judgments in foreclosure by inserting in the Civil Practice Act new sections known as 1083a and 1083b. That such legislative acts constitute an unreasonable interference of the plaintiff's contract rights with the defendants, David B. Jacobs and Mary V. Jacobs, and are wholly unconstitutional and in violation of Article 1, Section 10, of the Constitution of the United States.

That plaintiff asks this Court for an order confirming the Referee's Report of Sale and directing the Clerk to enter judgment in favor of the plaintiff and against the defendants, David B. Jacobs and Mary V. Jacobs, in the sum of Nine Thousand Five Hundred and Ninety Dollars (\$9,590), with interest from the 24th day of May, 1938, at the rate of six per centum (6%) per annum, in accordance with the Referee's Report of Sale and the plaintiff's contractual rights.

Robt. B. Honeyman.

Sworn to before me this 2nd day of June, 1938.

M. K. Lotterer, Notary Public, New York County.

[fol. 10] IN SUPREME COURT OF NEW YORK, COUNTY OF
QUEENS

[Same title]

REFEREE'S REPORT OF SALE

To the Supreme Court of the State of New York, County of Queens:

I, Edward T. Shannon, the Referee appointed by the judgment made and entered in this action bearing date the 21st day of April, 1938, to make the sale of the mortgaged

lands and premises therein particularly described, do respectfully report as follows:

First. That I caused due notice of the sale of the said lands and premises on the 19th day of May, 1938, at 12 o'clock noon, at the front steps of the Town Hall, Parsons Boulevard and Jamaica Avenue, Jamaica, Borough of Queens, City and State of New York, to be given and published according to law and the rules and practice of this Court, as will fully appear by the affidavits hereto annexed.

Second. That at the time and place for which the said sale was noticed as aforesaid, I attended in person, and, agreeably to such notice, offered the said mortgaged lands and premises for sale to the highest bidder, and sold the same to the plaintiff, Robert B. Honeyman, for the sum of Seventy-five hundred (\$7500.00) Dollars, that being the highest sum bidden therefor, and received from the purchaser in cash ten per cent of said sum.

Third. . . .

[fol. 11] Fourth. That I have allowed out of the said purchase money the sum of Six hundred and sixty-three and 38/100 (\$663.38) Dollars for taxes which were liens on the said mortgaged premises at the time of such sale, and for which receipts are hereto annexed.

Fifth. . . .

Sixth. That I have been paid by plaintiff and retained for my fees the sum of One hundred (\$100.00) Dollars.

Seventh. Plaintiff has disbursed for advertising expenses, as shown by bills hereto annexed, the sum of One hundred twenty-seven and 40/100 (\$127.40) Dollars.

Eighth. I have allowed to the attorney for the plaintiff the sum of Two hundred eighty-eight and 25/100 (\$288.25) Dollars for the costs and an additional allowance of Two hundred (\$200.00) Dollars awarded to the plaintiff by such judgment and for which a receipt is hereto annexed.

Ninth. . . .

Tenth. That I have made, executed and delivered to such purchaser a good and sufficient deed of conveyance for the said mortgaged premises so sold.

Eleventh. That there is due to the plaintiff a deficiency of Nine thousand five hundred ninety and 20/100 (\$9,590.00) Dollars, with interest from the date of this report.

[fol. 12] Annexed hereto and made a part of this my report is a statement showing the several items aforesaid and the mode of computation.

All of which is respectfully submitted.

Dated, New York, May 24, 1938.

Edward T. Shannon, Referee.

Statement

Amount due on bond and mortgage, as per judgment, and for insurance premium advanced		\$15,654.17
Interest to date (time of closing sale)		117.00
		<hr/>
		\$15,771.17
Amount of purchase money	\$7,500.00	
Paid for taxes	\$483.38	
Referee's fees	\$100.00	
Advertising expenses	\$127.40	
Plaintiff's costs and allowance	\$428.25	
		<hr/>
Total	1,319.03	
Balance being amount paid plaintiff on account of claim		6,180.97
		<hr/>
Deficiency		\$9,590.20

Dated, New York, May 24, 1938.

Edward T. Shannon, Referee.

[fol. 13] SUPREME COURT, QUEENS COUNTY

[Same title]

Received, May 24, 1938, from Edward T. Shannon, Esq., the Referee appointed by the judgment herein to make the sale of the premises therein described, the sum of Two hundred twenty-eight and 25/100 Dollars (\$228.25), in full for the costs awarded plaintiff by the said judgment, and also, an extra allowance of Two hundred (\$200.00) Dollars awarded therein.

David R. J. Arnold, Attorney for Plaintiff.

SUPREME COURT, COUNTY OF QUEENS

[Same title]

STATE OF NEW YORK,
County of Queens, ss:

Edward T. Shannon, being duly sworn, deposes and says:
That he is the Referee duly appointed herein to make the sale in the above entitled action and the officer who made such sale.

[fol. 14] That the above report of sale signed by him is in all respects true and correct, and said report and statement annexed thereto contain a true, accurate and complete report of the disposition of the proceeds of such sale.

Edward T. Shannon.

Sworn to before me this 24th day of May, 1938, John
J. Fox, Notary Public, Bronx County.

[fol. 15] IN SUPREME COURT OF NEW YORK, COUNTY OF
QUEENS

ROBERT B. HONEYMAN, Plaintiff,
against

ALMA CLAIRE CLARK, Individually and as Executrix under the Last Will and Testament of Annie E. Poth, Deceased; David B. Jacobs, Mary V. Jacobs, His Wife; Louis H. Pink, Successor to George S. Van Schaick, Superintendent of Insurance of the State of New York, as Liquidator of the Equitable Casualty and Surety Company; "John Doe No. 1," "John Doe No. 2," Said Names Quoted Being Fictitious, the Persons Intended Being the Tenants, if Any, of the Premises Described in the Complaint, and Precious Metals Research Works, Inc., Defendants

SUMMONS

To the above named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a

notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, February 15, 1938.

David R. J. Arnold, Attorney for Plaintiff, Office & P. O. Address, 61 Broadway, Borough of Manhattan, New York City.

[fol. 16] IN SUPREME COURT OF NEW YORK, COUNTY OF
QUEENS

[Same title]

COMPLAINT

The plaintiff, by his attorney, David R. J. Arnold, complaining of the defendants, alleges upon information and belief:

First. That on or about the 4th day of February, 1928, David B. Jacobs and Mary V. Jacobs, his wife, for the purpose of securing the payment to Title Guarantee and Trust Company, a domestic corporation, its successors or assigns, of the sum of Fifteen thousand (\$15,000.00) dollars, with interest thereon, executed and delivered to said Title Guarantee and Trust Company, their bond, bearing date on that day, and sealed with their seals, whereby, for the payment of said sum, they bound themselves, jointly and severally unto said Title Guarantee and Trust Company, its successors or assigns, in the said sum of Fifteen thousand (\$15,000.00) dollars, to be paid on the 4th day of February, 1931, with interest thereon to be computed from the 4th day of February, 1928, at the rate of six (6%) per centum per annum, and to be paid on the first day of July next ensuing the date hereof, and semi-annually thereafter.

Second. That as collateral security for the payment of said indebtedness, the said David B. Jacobs and Mary V. Jacobs, his wife, on the 4th day of February, 1928, executed, acknowledged and delivered, to the said Title Guarantee and Trust Company, a mortgage, whereby they

[fol. 17] granted, bargained and sold to said Title Guarantee and Trust Company, the following described premises:

. All that certain lot, piece or parcel of land, situate, lying and being at Far Rockaway in the Fifth Ward of the Borough of Queens, City of New York, County of Queens and State of New York, bounded and described as follows:

Beginning at the corner formed by the intersection of the Southerly Side of Central Avenue, known as Far Rockaway Boulevard, with the Easterly side of Seneca Street, known as Beach Twelfth Street, as said Central Avenue and Seneca Street are laid out on a certain map entitled, "Map of Property at Far Rockaway, 5th Ward, Borough of Queens, City of New York, Belonging to The Oak Knoll Co.," surveyed by E. W. & F. W. Conklin, City Surveyors, and filed in the Office of the Clerk of the County of Queens July 1903, and from said point of beginning running Southerly along said side of Seneca Street one hundred and ninety-eight feet, thence Easterly at right angles to Seneca Street eighty and forty-three one-hundredths feet, thence Northerly parallel with Oak Street, known as Beach Ninth Street, as said Oak Street is shown on the above recited map, sixty-three one-hundredths of a foot, thence Easterly at right angles to said side of Oak Street twenty-five feet, thence Northerly parallel with Oak Street one hundred and fifty feet, thence Westerly at right angles to Oak Street twenty-five feet, thence Northerly parallel with Oak Street eighty-two and ninety-five one-hundredths feet to the Southerly [fol. 18] side of Central Avenue, and thence Westerly along said side of Central Avenue forty-six and fifty-five one-hundredths feet to a point, and thence Westerly still along said side of Central Avenue twenty-one and forty one-hundredths feet to the corner, the point or place of beginning.

Together with all the right, title and interest of the said mortgagor, of, in and to Central Avenue and Seneca Street, lying in front of and adjoining said premises to the centre lines thereof.

Third. That the said mortgage was duly recorded in the office of the Register of the County of Queens, on the 7th day of February, 1928, in Liber 3304 of Mortgages, at page 437, and the mortgage recording tax was then and there duly paid to the Register.

Fourth. That the said mortgage contains the same condition as the bond, and in case of default of payment of said sum of money, or interest thereon, or any part thereof, the said Title Guarantee and Trust Company, its successors and assigns, was empowered to sell the mortgaged premises according to law.

Fifth. That the said bond and mortgage were thereafter and on or about the 3rd day of March, 1928, duly assigned by said Title Guarantee and Trust Company to Robert B. Honeyman, the plaintiff herein, by instrument in writing dated on that day, and recorded on the 29th day of January, 1934, in the office of the Register of the County of Queens, in Liber 4070 of Mortgages, at page 99; and that said [fol. 19] plaintiff, Robert B. Honeyman, ever since has been and now is the lawful owner and holder of said bond and mortgage.

Sixth. That on or about the 6th day of January, 1931, by agreement in writing, dated on that day, between Title Guarantee and Trust Company and David B. Jacobs and Mary V. Jacobs, his wife, said bond and mortgage, upon which there remained the entire principal sum of Fifteen thousand (\$15,000.00) dollars, and interest, was duly extended until the 4th day of February, 1934, with interest at the rate of six (6%) per centum per annum, to be computed from the first day of July, 1930, and to be paid semi-annually on the first days of January and July in each year, until the said principal sum shall be wholly paid.

Seventh. That thereafter and on or about the 23rd day of February, 1933, said David B. Jacobs, by deed dated and acknowledged on that day, and recorded in the office of the Register of the County of Queens, in Liber 3635 of Conveyances, at page 537, duly granted and conveyed the said mortgaged premises to Mary V. Jacobs, his wife, of the Borough and County of Queens, City and State of New York, subject, however, to the lien of the said mortgage, in the sum of Fifteen thousand (\$15,000.00) dollars, and interest thereon.

Eighth. That thereafter and on or about the 9th day of April, 1936, by deed dated and acknowledged on that day, and recorded in the office of the Register of the County of Queens in Liber 3805 of Conveyances, page 215, on the 17th

day of April, 1936, said mortgaged premises were duly [fol. 20] granted and conveyed by Eugene E. Fink, Referee, to Alma Claire Clark, as Executrix under the Last Will and Testament of Annie E. Poth, deceased, subject, however, to the lien of plaintiff's said first mortgage.

Ninth. That thereafter and on or about the 8th day of January, 1937, by deed dated and acknowledged on that day, and recorded in the office of the Register of the County of Queens on the 22nd day of January, 1937, in Liber 3859 of Conveyances, page 96, said Alma Claire Clark, as Executrix under the Last Will and Testament of Annie E. Poth, deceased, duly granted and conveyed said mortgaged premises to Alma Claire Clark, subject, however, to the lien of plaintiff's said mortgage. That the defendant Alma Claire Clark claims to be the owner in fee of said premises.

Tenth. That the said mortgage provides, among other things, as follows:

"4. That the whole of said principal sum shall become due at the option of the holder of this mortgage immediately after default in the payment of any installment of principal, or in the payment of interest for thirty days, or after default in the payment of any tax, water rate or assessment for thirty days."

"13. That the holder of this mortgage, in any action to foreclose it, shall be entitled (without notice and without regard to the adequacy of any security for the debt) to the appointment of a receiver of the rents and profits of said premises; and in the event of any default in paying said [fol. 21] principal or interest, such rents and profits are hereby assigned to the holder of this mortgage as further security for the payment of said indebtedness."

Eleventh. That the defendant Alma Claire Clark has failed to comply with the conditions of said bond and mortgage and extension agreement, by omitting to pay the installment of interest amounting to Three hundred and seventy-five (\$375.00) dollars, which, by the terms thereof, became due and payable on the first day of January, 1938, although more than thirty days have elapsed since said installment of interest became due and payable; likewise by failing and omitting to pay the following taxes, levied by the

City of New York, and which are liens on the mortgaged premises:

1937—Second half taxes

although notice of said default and demand for payment has been given to the said defendant, and more than thirty days has elapsed since said taxes became due and payable, and since demand for payment has been given.

That it was covenanted and agreed in and by said bond and mortgage that the mortgagors, their heirs and assigns, would keep the buildings on said mortgaged premises insured against loss by fire for the benefit of the mortgagee, his executors, administrators and assigns.

That said defendant Alma Claire Clark did not keep the premises insured against loss or damage by fire, and wholly neglected so to do, in the following respect, to wit: that the [fol. 22] policy covering the buildings on said premises, Policy No. 901692 of Scottish Union Insurance Company, expired on October 27, 1937; said policy was renewed and Policy No. F421085 of the same company was issued; this policy was subsequently cancelled by the company because of the defendant Alma Claire Clark's failure to pay the premium therefor; that in default of said defendant's keeping of the buildings so insured, the plaintiff, pursuant to the provisions of said bond and mortgage, on or about the 13th day of January, 1938, caused such insurance to be issued by Glens Falls Insurance Company, of Glens Falls, New York, for the term of three (3) years from January 13, 1938, in the sum of Fifteen thousand (\$15,000.00) dollars and paid therefor the premium of Seventy-five (\$75.00) dollars; that after demand duly made prior to the commencement of this action, the said defendant Alma Claire Clark has neglected and failed to repay to the plaintiff the premium so paid; and that such premium payment with interest thereon from the 15th day of February, 1938, is secured by said mortgage, and is now justly due and owing to the plaintiff from the said defendant.

The plaintiff has therefore elected, and does hereby elect that the entire principal sum of said bond and mortgage shall be and become due and payable, and there is accordingly due, to the plaintiff thereon, the sum of Fifteen thousand (\$15,000.00) dollars, with interest thereon, at the rate of five (5%) per centum per annum, from the first day of July, 1937.

Twelfth. That in order to protect the security of said bond and mortgage, it may be necessary for the plaintiff to [fol. 23] pay, during the pendency of this action, certain sums for taxes, assessments, water rates, insurance premiums and other disbursements necessary for the upkeep of the mortgaged premises, which sums, if any, when paid, will be added to the amount due on the aforesaid bond and mortgage and will be a charge against the proceeds of the sale.

Thirteenth. That the defendant, Precious Metals Research Works, Inc., is a domestic corporation.

Fourteenth. That the defendants have, or claim to have, some interest in or lien upon said mortgaged premises, or some part thereof, which interest or lien, if any, has accrued subsequent to the lien of the plaintiff's mortgage, and is subject and subordinate thereto.

Fifteenth. That no other action or proceeding has been brought at law or otherwise for the recovery of said sum secured by said bond and mortgage, or any part thereof, except that in the year 1936 an action was brought by plaintiff to foreclose said mortgage, which action was discontinued.

Wherefore, plaintiff demands judgment that the defendants and all persons claiming under them, subsequent to the commencement of this action and the filing of the notice of pendency thereof, may be forever barred and foreclosed of all right, claim, lien and equity of redemption in the said mortgaged premises; that the said premises may be decreed to be sold according to law subject to covenants and restrictions contained in Liber 1307 of Conveyances, at pages 200, [fol. 24] 226 and 228, as modified by Liber 1359 of Conveyances, at page 478; that the amount due to the plaintiff on said bond and mortgage, and for the payment of fire insurance premiums with interest thereon from the date of payment, may be adjudged; that the moneys arising from the sale may be brought into Court; that the plaintiff may be paid the amount adjudged to be due to the plaintiff with interest to the time of such payment, together with the costs and disbursements of this action, and the expenses of said sale, so far as the amount of such money properly applicable thereto will pay the same; that the defendants, David B. Jacobs and Mary V. Jacobs, his wife, may be adjudged to

pay any deficiency which may remain after applying all of such money so applicable thereto, and that the plaintiff may have such other and different relief in the premises as shall be just and equitable.

David R. J. Arnold, Attorney for Plaintiff, Office & P. O. Address, 61 Broadway, Borough of Manhattan, New York City.

(Duly verified.)

[fol. 25] IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

[Same title]

NOTICE OF APPEARANCE AND DEMAND

SIR:

Please take notice that the defendants David B. Jacobs, Mary V. Jacobs appear in this action, and that the undersigned is retained as attorneys for them therein, and demand that a copy of all papers in this action except the summons and complaint be served on them at this office, number 170 Broadway, Borough of Manhattan, City of New York.

Dated, March 1st, 1938.

Yours, etc., Sobel & Brand, Attorneys for Defendants, David B. Jacobs and Mary V. Jacobs, Office & P. O. Address, 170 Broadway, Borough of Manhattan, City of New York.

To David R. J. Arnold, Esq., Attorney for Plaintiff, 61 Broadway, New York City.

[fol. 26] IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

[Same title]

JUDGMENT OF FORECLOSURE AND SALE—April 19, 1938

On the original summons and duly verified complaint and notice of pendency of this action, all filed in the office of the Clerk of the County of Queens on the 25th day of February,

1938, and on the affidavit of Emanuel Israel, sworn to February 16, 1938, and the affidavits of John S. Hoghland, sworn to March 23, 1938, showing due personal service of the summons and complaint on each and every necessary party defendant herein, and on the notices of appearance of the defendants, David B. Jacobs and Mary V. Jacobs, and Louis H. Pink, Successor to George S. Van Schaick, Superintendent of Insurance of the State of New York, as liquidator of the Equitable Casualty and Surety Company, more particularly referred to in the affidavit of regularity of plaintiff's attorney, David R. J. Arnold, sworn to March 28, 1938, and of said affidavit of regularity from which it appears to the satisfaction of this Court that this action is brought to foreclose a first mortgage on real property situate in the County of Queens, the whole amount of which, as alleged in the complaint, is now due and payable with interest thereon, as therein alleged; that each and every [fol. 27] necessary party defendant herein has been personally served with the said summons and complaint within the State of New York, more than twenty (20) days prior to March 28, 1938, the date on which said affidavit of regularity was sworn to; that no defendant has answered or made any motion raising an objection to the complaint and each defendant is in default for want of pleading, and this Court having duly made its order of reference, bearing date the 5th day of April, 1938, which order was duly filed herein in the office of the Clerk of the County of Queens on the 7th day of April, 1938, appointing Edward T. Shannon, Esq., as referee to compute the amount due the plaintiff, with interest to the date of his report, upon the bond and mortgage set forth in the complaint in this action, and to examine and report the situation of the mortgaged premises and whether the mortgaged premises can, in his opinion, be sold in parcels without material injury to the parties interested, and to state his reasons therefor, and if, in his opinion, a sale of the whole of said mortgaged premises in one parcel will be more beneficial to all the interests of all the parties concerned, and on the stipulation of Sobel & Brand, Esqs., attorneys for David B. Jacobs and Mary V. Jacobs, the only defendants entitled to notice of the hearing before said referee, waiving such notice, endorsed upon and filed with said referee's report, and said referee having made his report bearing date the 8th day of April, 1938, by

which report said referee reported that there was due to the plaintiff on April 8, 1938, the date of his said report, the sum of Fifteen thousand six hundred and fifty-four and 17/100 (\$15,654.17) dollars, for principal and interest, and [fol. 28] for fire insurance premium advanced by the plaintiff, and further reported that he had ascertained the situation of the mortgaged premises, and that they cannot be sold except in one parcel; that a sale of the whole premises is necessary and would be most beneficial to the parties, and said referee's report and testimony taken before him, having been duly filed herein on or about the 9th day of April, 1938, and the said Sobel & Brand, Esqs., attorneys for the defendants, David B. Jacobs and Mary V. Jacobs, the only defendants entitled to notice hereof, having waived such notice and consented to the entry of judgment of foreclosure and sale herein, as appears from their stipulation to the effect endorsed hereon, and the motion having come on to be heard, and the plaintiff having appeared in support thereof by David R. J. Arnold, his attorney, and no one having appeared in opposition thereto, and the Court having duly deliberated on the several matters and things hereinbefore recited;

Now on motion of David R. J. Arnold, plaintiff's attorney, it is

Ordered, adjudged and decreed, that the said report of the said referee be, and the same hereby is in all respects ratified and confirmed; and it is further

Ordered, adjudged and decreed, that the mortgaged premises described in the complaint in this action, as hereinafter set forth, or so much thereof as may be sufficient to raise the amount so found and reported due to the plaintiff for principal and interest, the expenses of the sale and the costs [fol. 29] of this action as provided by Sections 1082 and 1087 of the Civil Practice Act, and which may be sold separately without material injury to the parties interested, be sold in one parcel agreeably to the report of said referee at public auction, at the front steps of the Town Hall, Parsons Boulevard and Jamaica Avenue, Jamaica, in the Borough of Queens, City of New York, by and under the direction of Edward T. Shannon, Esq., who is hereby appointed referee for that purpose; that said referee give public notice of the time and place of such sale according to law and the rules of practice of this Court, in the The

Argus, and public notice of such sale pursuant to Section 986 of the Civil Practice Act, said notice of sale to contain a description of the property to be sold to conform in all respects with the description set forth in this judgment; and to provide that the premises be sold subject to covenants and restrictions contained in Liber 1307 of Conveyances, at pages 200, 226 and 228, as modified by Liber 1359 of Conveyances, at page 478; that the plaintiff or any party to this action may become the purchaser or purchasers on such sale; that said referee execute to the purchaser or purchasers on such sale a deed or deeds of the premises sold; that such referee on receiving the proceeds of sale forthwith pay therefrom the taxes, assessments and water rents which are or may become liens on the premises at the time of the sale, with such interest or penalties as may have lawfully accrued thereon to the date of payment. That said referee then deposit the balance of such proceeds of sale in the Bank of the Manhattan Company, in his name as referee, within five days after the same shall be received by him and be ascertainable, and shall thereafter make the following [fol. 30] payments, and his checks drawn for that purpose shall be paid by said depository:

First. His fees and commissions as referee on said sale herein as fixed by the Civil Practice Act, not exceeding, however, the sum of \$100.00.

Second. Advertising expenses as shown on the bills presented and certified by the said referee to be correct, and duplicate copies of which shall be left with said depository.

Third. Said referee shall also pay to the plaintiff the sum of \$228.25, adjudged to the plaintiff for his costs and disbursements in this action with interest thereon from the date hereof, together with an additional allowance of \$200.00 hereby awarded to the plaintiff in this action with interest thereon from the date of entry hereof; and also the sum of \$15,654.17, the said amount so reported due as aforesaid, with interest thereon from the date of said report, or as much thereof as the purchase money of the mortgaged premises will pay of the same.

Fourth. If such referee intends to apply for a further allowance for his fees he may leave upon deposit such amounts as will cover such additional allowance to await the further order of the Court thereon after application duly made.

That in case the plaintiff be the purchaser of said mortgaged premises at said sale, or in the event that the rights of the purchaser at said sale and the terms of sale under this judgment shall be assigned to and be acquired by the plaintiff, [fol. 31] and a valid assignment thereof filed with said referee, said referee shall not require the plaintiff to pay in cash the entire amount bid at said sale but shall execute and deliver to the plaintiff a deed or deeds of the premises sold upon the payment to said referee of the amounts specified above in items marked "First" and "Second"; and the amounts of the aforesaid taxes, assessments and water rents and interest or penalties thereon, or in lieu of the payment of said last mentioned amounts, upon filing with said referee receipts of the proper municipal authorities showing the payment thereof; that the balance of the amount bid, after deducting therefrom the aforesaid amounts paid by the plaintiff, for referee's fees, advertising expenses and taxes, assessments and water rents, shall be allowed to the plaintiff and applied by said referee upon the amounts due to the plaintiff as specified above in item marked "Third," that if, after so applying the balance of the amount bid, there shall be a surplus over and above the said amounts due to the plaintiff, the plaintiff shall pay to said referee upon delivery to him of said referee's deed, the amount of such surplus; that said referee on receiving said several amounts from the plaintiff shall forthwith pay therefrom said taxes, assessments, water rents and interest or penalties thereon, unless the same have already been paid, and shall then deposit the balance in said depository as hereinabove directed within five days after the same shall be received by him and be ascertained.

That said referee take the receipt of the plaintiff, or his attorney, for the amounts paid as hereinbefore directed in item marked "Third," and file it with his report of sale; [fol. 32] that the surplus moneys, if any, so deposited or so remaining on deposit shall be withdrawn only on the order of the Court, signed by a Justice of the Court; that the said referee make his report of such sale and file it with the Clerk of the County of Queens with all convenient speed; that if the proceeds of said sale be insufficient to pay the amount so reported due to the plaintiff, with the expenses of the sale, interest, cost and allowances as aforesaid, the said referee specify the amount of such deficiency in his report

of sale; that the plaintiff may apply in this action for leave to enter a deficiency judgment against the defendants, David B. Jacobs and Mary V. Jacobs, pursuant to the Civil Practice Act; and that the purchaser or purchasers at such sale be let into possession of the premises sold to them on production of the referee's deed or deeds of such premises; and it is still further

Ordered, adjudged and decreed, that each and every one of the defendants in this action, and all persons claiming under them or any or either of them after filing of said notice of the pendency of this action, be and they are forever barred and foreclosed of all right, title, interest, claim, lien and equity of redemption in and to said mortgaged premises and each and every part and parcel thereof. The following is a description of said mortgaged premises, hereinabove mentioned, and hereby directed to be sold:

All that certain lot, piece or parcel of land, situate, lying and being at Far Rockaway in the Fifth Ward of the Borough of Queens, City of New York, County of Queens and State of New York, bounded and described as follows: [fol. 33] Beginning at the corner formed by the intersection of the Southerly Side of Central Avenue, known as Far Rockaway Boulevard, with the Easterly side of Seneca Street, known as Beach Twelfth Street, as said Central Avenue and Seneca Street are laid out on a certain map entitled, "Map of Property at Far Rockaway, 5th Ward, Borough of Queens, City of New York, Belonging to The Oak Knoll Co.," surveyed by E. W. & F. W. Conklin, City Surveyors, and filed in the Office of the Clerk of the County of Queens July 1903, and from said point of beginning running Southerly along said side of Seneca Street one hundred and ninety-eight feet, thence Easterly at right angles to Seneca Street eighty and forty-three one-hundredths feet, thence Northerly parallel with Oak Street, known as Beach Ninth Street, as said Oak Street is shown on the above recited map, sixty-three one-hundredths of a foot, thence Easterly at right angles to said side of Oak Street twenty-five feet, thence Northerly parallel with Oak Street one hundred and fifty feet, thence Westerly at right angles to Oak Street twenty-five feet, thence Northerly parallel with Oak Street eighty-two and ninety-five one-hundredths feet to the Southerly side of Central Avenue, and thence Westerly along said side of Central Avenue forty-six and fifty-five one-hun-

dredths feet to a point, and thence Westerly still along said side of Central Avenue twenty-one and forty one-hundredths feet to the corner, the point or place of beginning.

Together with all the right, title and interest of the said [fol. 34] mortgagor, of, in and to Central Avenue and Seneca Street, lying in front of and adjoining said premises to the center lines thereof.

Enter.

J. T. H., J. S. C.

Entered 4/21/38.

Fees: \$7.75.

IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

[Same Title]

AFFIDAVIT OF DAVID B. JACOBS, READ IN OPPOSITION TO MOTION

STATE OF NEW YORK,

County of Queens, ss:

David B. Jacobs, being duly sworn, deposes and says: That he is one of the defendants in the above entitled action.

That this affidavit is respectfully submitted on behalf of the defendant Mary V. Jacobs and your deponent in opposition to the plaintiff's motion for an order directing the deficiency judgment to be entered against said Mary V. Jacobs and your deponent in the sum of \$9,590.

Deponent has been advised and believes that the present application now before the Court is being pursued by the plaintiff upon the contractual liability as set forth in the bond heretofore executed by Mary V. Jacobs and your deponent as collateral security for the mortgage which has been foreclosed herein and not pursuant to the present provisions of the Civil Practice Act, namely, Section 1083 which became effective on April 7, 1938, and Section 1083a as amended by the Laws of 1937.

As the Court will note from a reading of the moving affidavit the original principal indebtedness of the plaintiff was \$15,000. Annexed hereto and made part of these opposing papers is the affidavit of Arthur Butler, a competent real estate appraiser, who states that in his opinion as such, the present market value of the property is \$25,318 which would leave an equity in favor of the plaintiff over and above any

sums due even were the Court to consider the full amount of the mortgage plus costs, interest and disbursements without giving credit for the amount received on the foreclosure sale. It is therefore respectfully submitted that under the present status as provided for in the foregoing sections of the Civil Practice Act, the plaintiff is not entitled to any deficiency judgment. This would be the fact if the plaintiff had proceeded in accordance with Section 1083 and Section 1083a of the Civil Practice Act which he has not done. It therefore follows, as deponent has been advised, that as a matter of law failure of the plaintiff to comply with the procedural requirements of the foregoing sections of the Civil Practice Act makes it incumbent upon this Court to deny this present application.

In so far as the plaintiff challenges the constitutionality of the present controlling sections of the Civil Practice Act dealing with deficiency judgments, the limitations thereon and judgments in actions on bonds, deponent has been advised [fol. 36] and believes that this question has been passed on by the Courts of this State as being constitutional in so far as the aforesaid sections, together with Section 1083B of the Civil Practice Act were passed for a limited period during a declared emergency and therefore do not violate either the State or the Federal constitution.

Deponent has been advised and believes that the question of the constitutionality of such sections has been passed on in the following cases:

Farmers' & Mechanics Savings Bank v. Eagle Building Co., 153 Mis. 554, 276 N. Y. S. 246.

Klinke v. Samuels, 264 N. Y. 144.

Wherefore, your deponent respectfully prays that an order issue from this Court denying the application of the plaintiff for a deficiency judgment in any amount against Mary V. Jacobs and your deponent and that said Mary V. Jacobs and your deponent have such other, further and different relief in the premises as to the Court may seem just and proper.

David B. Jacobs.

Sworn to before me this 7th day of June, 1938. W. W. Schleit, Notary Public. Queens County. Clk's No. 697.

[fol. 37] IN SUPREME COURT OF NEW YORK, COUNTY OF
QUEENS

[Same title]

AFFIDAVIT OF ARTHUR BUTLER, READ IN OPPOSITION TO MOTION

STATE OF NEW YORK,

County of Queens; ss:

Arthur Butler, being duly sworn, deposes and says that he is a duly licensed real estate broker authorized to conduct a general real estate brokerage business in the State of New York and maintains an office for the conduct of his business at #2152 Mott Avenue, Far Rockaway, in the Borough of Queens, City and State of New York.

That your deponent has been continuously engaged in the business of buying and selling real property in Queens County since 1898.

That your deponent has bought and sold real property from Reis Park in Queens County to Valley Stream, Nassau County, which said district is commonly known as the Rockaways.

That your deponent has acted as appraiser for the Home Owners' Loan Corporation wherein he appraised upwards of three hundred (300) parcels of real property in the Rockaways.

That your deponent has acted as appraiser for various banks, mortgage companies, and other institutions and individuals, and on numerous occasions has testified in court for the purpose of establishing the value of various pieces of real property.

That your deponent has made an inspection of the property of which this action is the subject and begs to report such findings to this Court.

[fol. 38] The building is a three story house containing living room, dining room, kitchen, breakfast room, maid's room and bath, a music room foyer hall and two miscellaneous rooms on the first floor, on the second floor there are four (4) bedrooms and two (2) baths, on the third floor there are five (5) rooms and one (1) bath and a store room. The house is heated by vapor vacuum steam and there is a two-car brick garage on the premises which said garage has an asbestos roof. The foundation of the house is constructed out of concrete blocks and piers and has a series of brick

steps at the entrance. The first floor of the building is shingled and the second and third floors are stuccoed. The roof which is comparatively new is of asbestos. The leaders and gutters are of copper and the property is surrounded by sidewalks and concrete curbs.

There are eighteen (18) oak trees on the property and the property contains a vacant ground on Seneca Street of approximately sixty (60) feet by 105.43.

The property is well located, is approximately opposite the Russell Sage Memorial Church and Far Rockaway Boulevard is seventy-four (74) feet wide and Seneca Street or Beach 12th Street is forty (40) feet wide.

That your deponent's appraisal is predicated upon his knowledge of the value of various pieces of real property in and around Far Rockaway, New York, and is likewise predicated upon the following figures concerning construction costs and depreciation.

There are 69,435 *cubic* feet in the premises which at a reasonable cost of \$.25 per *cubic* foot would have cost Seventeen [fol. 39] Thousand Three Hundred Fifty-Eight and 00/100 Dollars (\$17,358.00) to build. Deducting from this figure approximately Forty (40%) per cent for depreciation or Six Thousand Nine Hundred Forty-Three and 00/100 Dollars (\$6,943.00), the present net value of the house today is Ten Thousand Four Hundred Fifteen Dollars (\$10,415.00), which, together with the value of the garage of Six Hundred Thirty-Six and 00/100 Dollars (\$636.00), makes a total valuation on the buildings of Eleven Thousand Fifty-One and 00/100 Dollars (\$11,051.00).

There are 19,023 square feet of property on the premises which, at a reasonable figure of Seventy-Five Cents (\$.75) per foot, would total Fourteen Thousand Two Hundred Sixty-Seven and 00/100 Dollars (\$14,267.00).

That your deponent submits that his experience in the aforesaid vicinity is such that a valuation of Seventy-Five Cents (\$.75) per square foot is fair and reasonable.

That the total present value of the aforesaid property in your deponent's opinion, adding together the value of the land and of the building, is Twenty-Five Thousand Three Hundred Eighteen and 00/100 Dollars (\$25,318.00).

Arthur Butler.

Sworn to before me this 7th day of June, 1938.
W. W. Schleit, Notary Public. Queens Co. Clk's
No. 697.

[fol. 40] IN SUPREME COURT OF NEW YORK, COUNTY OF
QUEENS

OPINION OF JUDGE LOCKWOOD—June 22, 1938

Application to enter a deficiency judgment for \$9,590, the full amount due, not pursuant to the provisions of the Civil Practice Act, section 1083 et seq., but upon the theory that such sections are unconstitutional as violative of section 10, article 1, of the Constitution of the United States. In view of the decision of the Court of Appeals (*Honeyman v. H...an*, 275 N. Y. 382; *Klinke v. Samuels*, 264 N. Y. 144; *City Bank Farmers Trust Co. v. Ardlea Corp'n*, 267 N. Y. 224), it is vain to present this contention at Special Term. Motion denied.

STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated and agreed that the foregoing printed papers on appeal contain true and correct copies of the notice of appeal, the order appealed from, and all of the papers upon which the Court below acted in making said order appealed from, and of the whole thereof, now on file in the office of the Clerk of the County of Queens, and certification thereof by said Clerk is hereby waived.

Dated, New York, September 23rd, 1938.

David R. J. Arnold, Attorney for Plaintiff-Appellant.
Sobel & Brand, Attorneys for Defendants-Respondents Jacobs.

[fols. 41-43] Bond on appeal for \$500.00, approved, omitted in printing.

[fol. 44] Citation, in usual form, omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The petition of Robert B. Honeyman, the appellant in the above-entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of New York en-

tered upon the remittitur of the Court of Appeals of the State of New York, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and statement as to jurisdiction, all as provided by the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from a final judgment dated the 26th day of October, 1938, of the Supreme Court of the State of New York, as prayed in said petition, and that the Clerk of the Supreme Court of the State of New York, in the County of Queens, shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and seal of said Court, [fol. 46] a true copy of the material parts of the record herein, which shall be designated by a praecipe or stipulation of the parties, or their counsel herein, all in accordance with the Rules of the Supreme Court of the United States.

It is Further Ordered that the said Appellant shall give a good and sufficient bond, in the sum of Five Hundred Dollars, that said appellant shall prosecute said appeal to effect and answer all costs, if he fails to make his plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate herein and of all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

Dated, 29th Oct., 1938.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

[fol. 47] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioner, Robert B. Honeyman, respectfully shows:

That he is the appellant in the above entitled action.

That the action is brought to foreclose a mortgage upon real property, executed by the appellees, David B. Jacob

and Mary V. Jacobs, on the 4th day of February, 1928, to secure the payment of their bond in the sum of Fifteen Thousand Dollars (\$15,000), and to procure a judgment against said appellees for any deficiency which might exist after the sale and application of the proceeds. Judgment of foreclosure and sale was duly entered in April 1938, and the mortgaged premises duly sold in May 1938 for the sum of Seventy-five Hundred Dollars (\$7500). The Referee duly appointed to sell the property in his report of the sale duly reported that after the payment of taxes and expenses [fol. 48] that "there is due to the plaintiff a deficiency of Nine Thousand Five Hundred Ninety and 20/100 Dollars (\$9,590.20), with interest from the date of this report", and prior to the enactment of Section 1083-a of the Civil Practice Act plaintiff was entitled to a judgment for that deficiency.

In 1933, by Chapter 794 of the Laws of the State of New York, the Legislature added Section 1083-a to the Civil Practice Act, which section purports to limit or deny the right of appellant to a deficiency judgment by empowering the Court to determine the value of the mortgaged premises and to credit that value so determined upon the indebtedness due the mortgagee as a payment thereupon, regardless of the amount received upon the foreclosure sale thereof.

After the sale of the premises in question by the Referee as aforesaid, appellant moved for a judgment for deficiency, alleging the unconstitutionality of the provisions of Section 1083-a, and demanding judgment for the whole deficiency shown by the Referee's report. The appellees filed affidavits in opposition alleging a value of the property equal to the mortgage debt. The Court rendered its decision denying any judgment for deficiency to appellant and sustaining the constitutionality of Section 1083-a. In the final order or judgment entered thereupon the Court ordered and adjudged that the application for deficiency judgment "is in all respects denied on the grounds that the value of the property is equal to the debt of the plaintiff, and pursuant to Section 1083-a of the Civil Practice Act of the State of New York, limiting deficiency judgments, the plaintiff is deemed paid as a matter of law, [fol. 49] which section is hereby held to be constitutional."

Appellant thereupon appealed to the Court of Appeals

directly under Section 588 of the Civil Practice Act, subdivision 3, which reads as follows:

"As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the Court."

And on such appeal the Court of Appeals has affirmed the constitutionality of Section 1083-a and the determination of the Special Term. The Remittitur of the Court of Appeals has been filed with the Clerk of the Supreme Court in Queens County and the judgment of the Court of Appeals made the judgment of the Supreme Court by judgment filed on the 26th day of October, 1938.

That the Court of Appeals is the highest Court of the State of New York in which a decision in this case can be had. That there is drawn in question the validity of a Statute on the ground that said Statute is repugnant to the Constitution and Laws of the United States, and the decision is in favor of the validity of said Statute notwithstanding your petitioner's contention that the Statute violates Article 1 of Section 10 of the Constitution of the United States.

And your petitioner alleges that in accordance with Section 237 of the Judicial Code of the United States this case is one in which a review could be had in the Supreme Court of the United States on a writ of error as a matter of right, under the legislation in force when the Act of January 31, 1938 was passed.

[fol. 50] In accordance with Section 237 of the Judicial Code and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows that this case is one in which a review can be had in the Supreme Court as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set forth in the assignment of errors filed herewith, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme

Court of the United States, as provided by the Rules of the said Supreme Court.

Copy of the opinion of the Court of Appeals is attached hereto and made a part of this petition.

Wherefore, your petitioner prays for the allowance of an appeal from the said Court of Appeals of the State of New York to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of New York may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of New York, County of Queens, under his hand and seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order may be made touching the security to be required of the petitioner, and that the bond tendered by the petitioner be approved.

Dated October 28th, 1938.

Robert B. Honeyman, Petitioner.

[fol. 51] IN COURT OF APPEALS OF NEW YORK

ROBERT B. HONEYMAN, Appellant,

vs.

ALMA CLAIRE CLARK, Individually, &c., and Others,
Defendants,

and

DAVID B. JACOBS and MARY V. JACOBS, His Wife, Respondents.

OPINION

PER CURIAM:

The plaintiff has brought an action for the foreclosure of a mortgage upon real property in Queens County, executed and delivered by the defendants, David B. Jacobs and Mary V. Jacobs, on the 4th day of February, 1928, to secure the payment of their bond in the sum of \$15,000. The plaintiff asks for a judgment of foreclosure and sale of the mortgaged premises and for judgment for any defi-

ciency which may arise upon such sale. Judgment of foreclosure and sale was entered in April, 1938, and the mortgaged premises were sold in May, 1938, to the plaintiff for the sum of \$7,500. The referee reported that after payment of taxes and expenses "there is due to the plaintiff a deficiency of \$9,590.21, with interest from the date of this report." Under the statute as it existed at the time the bond and mortgage were executed, the plaintiff would have been entitled to a judgment for that deficiency.

Sections 1083 a and b of the C. P. A. enacted thereafter purport to limit the right of the plaintiff to enter a deficiency judgment: The plaintiff, alleging "that such legislative acts constitute an unreasonable interference of the plaintiff's contract rights with the defendants, David B. Jacobs and Mary V. Jacobs, and are wholly unconstitutional and in violation of Article 1, Section 10 of the Constitution of the United States," has applied to the court for an order confirming the referee's report of sale and directing the clerk to enter in his favor judgment against the said defendants in the sum of \$9,500. The plaintiff appeals to this court from an order of Special Term which provides that the application for a deficiency judgment "is in all respects denied on the grounds that the value of the property is equal to the debt of the plaintiff, and pursuant to Section 1083-a of the Civil Practice Act of the State of New York, limiting deficiency judgments, the plaintiff is deemed paid as a matter of law, which section is hereby held to be constitutional." The appeal is taken direct to this court pursuant to the provisions of Section 588, subdivision 3, C. P. A., and the only question which may be considered on this appeal is the validity of Section 1083-a under the Constitution of the United States. We have, in other cases, sustained its validity. (*Honeyman v. Hanan*, 275 N. Y. 382; *Klinke v. Samuels*, 264 N. Y. 144; *City Bank Farmers Trust Co. v. Ardlea Corp.*, 267 N. Y. 224).

Order affirmed without costs.

[fol. 52½] Service of a copy of the within Order and Petition admitted this 31st day of October, 1938.

Sobel & Brand, Attorneys for Appellees.

[fol. 53] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is Hereby Stipulated by counsel for both sides in the above cause that the Clerk, in making up the transcript, shall follow the papers and records as shown in the transcript on file in the Court of Appeals and in the Supreme Court of the State of New York making the judgment of the Court of Appeals the judgment of said Supreme Court, together with the papers filed by the authority of Rule 12 of the Supreme Court of the United States, without omission or addition.

Dated, October 31, 1938.

David R. J. Arnold, Attorney for Appellant. Sobel
& Brand, Attorneys for Appellees.

[fol. 54] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The appellant assigns the following errors in the record and proceedings in this case:

1. The State Court erred in holding that Section 1083-a of the Civil Practice Act, enacted by the Legislature of the State of New York by Chapter 794 of the Laws of 1933, does not violate the provisions of Article 1 of Section 10 of the Constitution of the United States.

2. The State Court erred in holding that the Legislature of the State of New York may validly enact that a Court of the State may in foreclosure proceedings determine the value of the mortgaged premises and that the mortgagee must accept such valuation as a credit or payment upon the mortgage debt, which debt was created and existed before the passage of the Act of the Legislature.

3. The State Court erred in not holding that Section 1083-a is an unreasonable violation of appellant's contract

[fol. 55] rights, without any proter ion of said rights or due consideration thereof and without ompensation.

4. Chapter 794 of the Laws of 1933 of the State of New York is a law impairing the obligation of contracts made before the enactment of such law, in that it impairs the rights of the holders of contract obligations secured by mortgage to enforce the same and takes from such creditors their contractual right of enforcement and recovery except to the extent of the limited remedy provided by such statute, which is a partial remedy only and less in value or extent than the contractual obligation; such impairment of the contractual rights of creditors and of the contractual obligation of debtors is in contravention of the provision of Article 1, Section 10, of the Constitution of the United States that no state shall pass any law impairing the obligation of contracts, and the State Court erred in holding that such statute was a valid exercise of legislative power by the State of New York and available to defeat appellant's recovery of judgment in accordance with the contract obligation.

Wherefore, on account of the errors hereinbefore assigned, appeallant prays that the judgment and order of the Court of Appeals and of the Supreme Court of the State of New York, entered thereupon in the above entitled case on the 26th day of October, 1938, be reversed and judgment directed to be entered in favor of the appeal-nt.

Dated, October 29th, 1938.

David R. J. Arnold, Attorney for Appellant.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 56] IN SUPREME COURT OF NEW YORK, COUNTY OF
QUEENS

[Title omitted]

ORDER ON REMITTITUR—October 25, 1938

The above named plaintiff having appealed to the Court of Appeals from the judgment or order of the Supreme Court entered and filed in the Office of the Clerk of the County of Queens on the 7th day of September, 1938, under the provisions of Section 588, Subdivision 3, of the Civil

Practice Act, and the said Court of Appeals having heard said appeal and having ordered and adjudged that the judgment and order of the Supreme Court, Queens County, be affirmed, and having ordered that the record of said appeal, and the proceedings therein, be remitted to the Supreme Court, according to the form of the statute in such case made and provided, to be enforced according to law;

Now, on motion of Sobel & Brand, attorneys for the defendants, David B. Jacobs and Mary V. Jacobs, it is

Ordered that the said judgment of the Court of Appeals be and the same hereby is made the judgment of the Supreme Court.

Enter.

Steinbirsch, J. S. C.

[fol. 57] IN SUPREME COURT OF NEW YORK, COUNTY OF
QUEENS

ROBERT B. HONEYMAN, Plaintiff,

VS.

ALMA CLAIRE CLARK, Individually and as Executrix under the Last Will and Testament of Annie E. Poth, Deceased;
David B. Jacobs, Mary V. Jacobs, His Wife, et al., Defendants

JUDGMENT ON REMITTITUR

A judgment or order in favor of the defendants, David B. Jacobs and Mary V. Jacobs, having been entered in this Court on the 7th day of September, 1938, denying a deficiency judgment to the plaintiff; and the plaintiff having appealed directly to the Court of Appeals under the provisions of Subdivision 3 of Section 588 of the Civil Practice Act; and the Court of Appeals having sent hither its remittitur, by which it appears that the Court of Appeals has affirmed said judgment or final order, without costs, and has remitted its judgment to this Court to be enforced according to law; and this Court having by an order duly entered herein on this 26th day of October, 1938, ordered that the said judgment of the Court of Appeals be made the judgment of this Court;

On motion of Sobel & Brand, attorneys for the defendants, David B. Jacobs and Mary V. Jacobs, it is

Ordered and Adjudged that the judgment or order of this Court entered herein on the 7th day of September, 1938, denying any deficiency judgment to the plaintiff, be and the same is hereby in all things affirmed without costs.

Dated, October 26th, 1938.

Paul Livoti, Clerk.

Signed Judgment Entered Oct. 26, 1938, at 9.25 A. M.

Paul Livoti, Clerk.

[fol. 58] UNITED STATES SUPREME COURT

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION
AS TO PRINTING RECORD—Filed November 12, 1938

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated, New York, November 10th, 1938.

David R. J. Arnold, Solicitor for Appellant.


[fol. 59] Service of a copy of the within Statement admitted this 10th day of November, 1938.

Sobel & Brand, Attys. for Appellees.

[fol. 60] [File endorsement omitted.]

Endorsed on cover: File No. 42,950. New York Supreme Court. Term No. 465. Robert B. Honeyman, appellant, vs. David B. Jacobs and Mary V. Jacobs. Filed November 8, 1938. Term No. 465, O. T., 1938.

MICRO CARD 22

TRADE MARK 



MICROCARD[®]
EDITIONS, INC.

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

519

3

8

1

6

6



NOV 8 1938

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 465

ROBERT B. HONEYMAN,

Appellant,

vs.

DAVID B. JACOBS AND MARY V. JACOBS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

ROBERT B. HONEYMAN,

DAVID R. J. ARNOLD,

Counsel for Appellant.

INDEX.

SUBJECT INDEX.

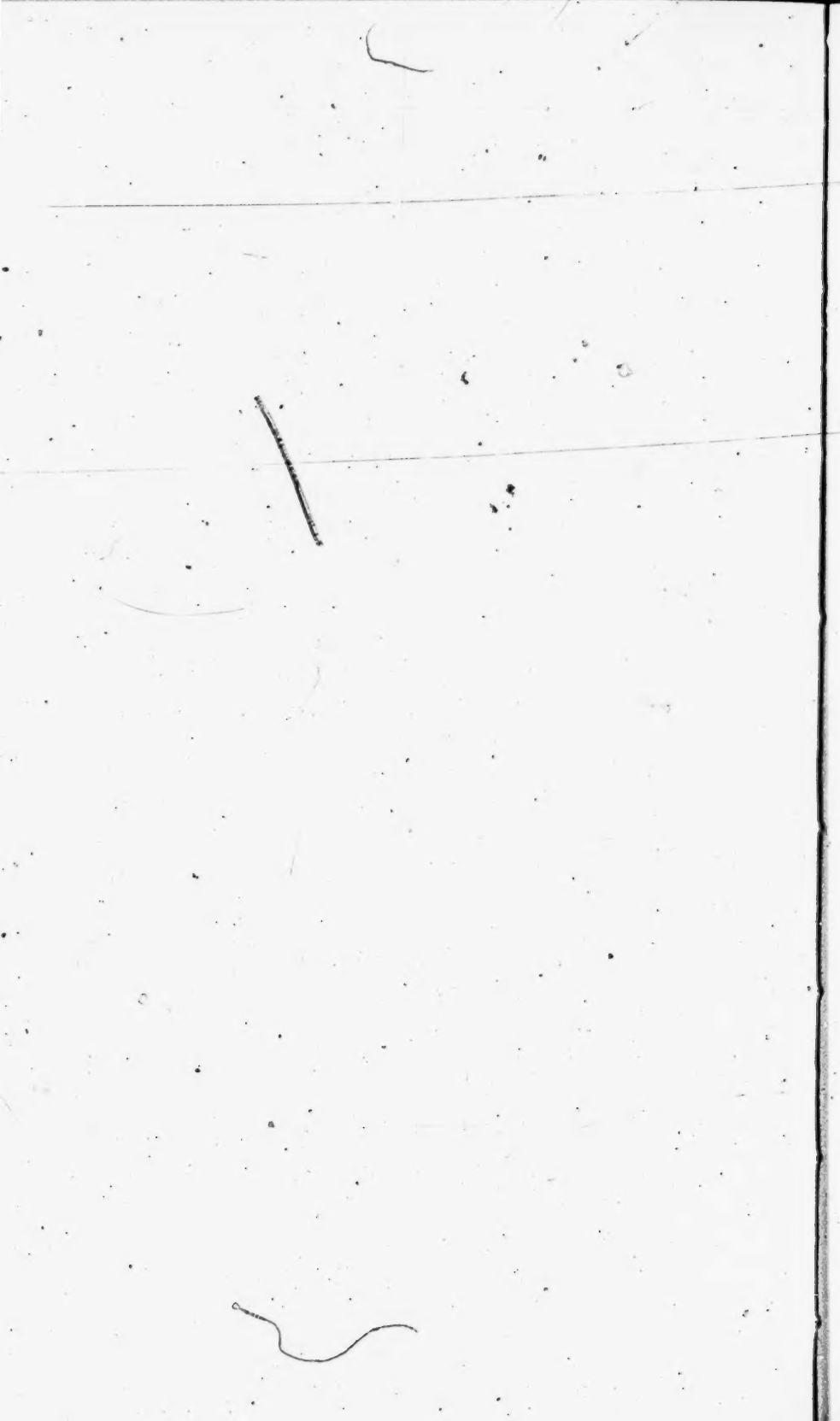
	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
State statute the validity of which is involved	1
Date of the judgment sought to be reviewed and date of application for appeal	4
Nature of the case and rulings below	4

CASE CITED.

<i>Home Building Loan Association v. Blaisdell</i> , 290 U. S. 398	6
---	---

STATUTES CITED.

Judicial Code, Section 237 (28 U. S. C. 344)	1
Laws of New York of 1933, Chapter 794, as amended (Laws of 1934, Chapter 277; Laws of 1935, Chapter 2; Laws of 1936, Chapter 87; Laws of 1937, Chapter 83; Laws of 1938, Chapter 501)	1



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 465

ROBERT B. HONEYMAN,

vs.

Appellant,

**ALMA CLAIRE CLARK, INDIVIDUALLY AND AS EXECUTRIX
UNDER THE LAST WILL AND TESTAMENT OF ANNIE E. POTH,
DECEASED, AND OTHERS, Defendants, AND DAVID B.
JACOBS AND MARY V. JACOBS, HIS WIFE,**

Appellees.

STATEMENT AS TO JURISDICTION.

The appellant contends that the Supreme Court of the United States has jurisdiction upon an appeal to review the judgment of the Supreme Court of the State of New York in question.

This appeal comes directly within the provision of Section 237 of the Federal Judicial Code (28 U. S. C. #344). It is a final judgment or order of the highest court of the State of New York in which a decision in the suit could be had. There is drawn in question the validity of a statute of the State of New York and the decision of the Court of Appeals of the State of New York is in favor of its validity.

The New York Statute, Chapter 794 of the Laws of 1933, reads as follows:

“AN ACT to amend the civil practice act, in relation to deficiency judgments in actions to foreclose mort-

gages on real property and actions to recover judgments on bonds secured by mortgages on real property.

"Became a law August 28, 1933, with the approval of the Governor Passed, on message of necessity, three-fifths being present.

"The People of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. It is hereby declared that a serious public emergency affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the State and nation, and the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

"§ 2. The civil practice act is hereby amended by inserting therein two new sections ten hundred and eighty-three-a and ten hundred and eighty-three-b, as follows:

"1083-a. LIMITATION UPON DEFICIENCY JUDGMENTS DURING EMERGENCY PERIOD.—No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where the mortgaged property shall be sold during the emergency, except as herein provided. Simultaneously with the making of a motion for an order confirming the sale or in any event within ninety days after the date of the sale, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such

notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus cost and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.

“§ 1083-b. JUDGMENTS IN ACTIONS ON BONDS.—In any action pending at the time this section as hereby added takes effect, or hereafter commenced during the emergency, other than an action to foreclose a mortgage, to recover a judgment for any indebtedness secured solely by a mortgage on real property and which originated simultaneously with such mortgage and which is secured by such mortgage, against any person or corporation directly or indirectly or contingently liable therefor, any party against whom a money judgment is demanded, shall be entitled to set off the fair and reasonable market value of the mortgaged property less the amounts owing on prior liens and encumbrances. In any action to foreclose the mortgage commenced after the emergency as defined by the law shall have expired, a deficiency judgment may be recovered as though this section had not been enacted but the amount of any money judgment recovered as provided

in this section shall be deducted in computing such deficiency judgment.

"3. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part hereof.

"4. The period of the emergency hereby declared shall be from the date this act takes effect until July first, nineteen hundred thirty-four. This act shall not apply to mortgages dated on or after July first, nineteen hundred thirty-two, or to any bond, collateral bond, guarantee, or extension agreement or other agreement or writing concerning or delivered in connection with any indebtedness secured by a mortgage dated on or after July first, nineteen hundred thirty-two.

"5. This Act shall take effect immediately."

By amendment, the period of emergency has been extended to July 1, 1939 (Laws of 1934, Chapter 277; Laws of 1935, Chapter 2; Laws of 1936, Chapter 87; Laws of 1937, Chapter 83; Laws of 1938, Chapter 501).

The judgment sought to be reviewed is that of the Court of Appeals of the State of New York, bearing date October 26, 1938, affirming the judgment of the Special Term, Queens County, dated September 7, 1938. The application for an appeal was presented to the Presiding Judge of the Court of Appeals of the State of New York on October 29, 1938.

The Court of Appeals in its opinion sets forth very succinctly all the facts and the question involved, and its determination. The court say:

"The plaintiff has brought an action for the foreclosure of a mortgage upon real property in Queens County, executed and delivered by the defendants, David B. Jacobs and Mary V. Jacobs, on the 4th day

of February, 1928, to secure the payment of their bond in the sum of \$15,000. The plaintiff asks for a judgment of foreclosure and sale of the mortgaged premises and for judgment for any deficiency which may arise upon such sale. Judgment of foreclosure and sale was entered in April, 1938, and the mortgaged premises were sold in May, 1938, to the plaintiff for the sum of \$7,500. The referee reported that after payment of taxes and expenses 'there is due to the plaintiff a deficiency of \$9,500.21, with interest from the date of this report.' Under the statute as it existed at the time the bond and mortgage were executed, the plaintiff would have been entitled to a judgment for that deficiency.

"Sections 1083 a and b of the C. P. A. enacted there, after purport to limit the right of the plaintiff to enter a deficiency judgment. The plaintiff, alleging 'that such legislative acts constitute an unreasonable interference of the plaintiff's contract rights with the defendants, David B. Jacobs and Mary V. Jacobs, and are wholly unconstitutional and in violation of Article 1, Section 10 of the Constitution of the United States,' has applied to the Court for an order confirming the referee's report of sale and directing the clerk to enter in his favor judgment against the said defendants in the sum of \$9,500. The plaintiff appeals to this court from an order of Special Term which provides that the application for a deficiency judgment 'is in all respects denied on the grounds that the value of the property is equal to the debt of the plaintiff, and pursuant to Section 1083-a of the Civil Practice Act of the State of New York, limiting deficiency judgment, the plaintiff is deemed paid as a matter of law, which section is hereby held to be constitutional.' The appeal is taken direct to this court pursuant to the provisions of Section 588, subdivision 3, C. C. P. A., and the only question which may be considered on this appeal is the validity of Section 1083-a under the Constitution of the United States. We have, in other cases, sustained its validity. (*Honeyman v. Hanan*, 275 N. Y. 382; *Klinke v. Samuels*,

264 N. Y. 144; City Bank Farmers Trust Co. v. Ardlea Corp., 267 N. Y. 224.)

"Order affirmed without costs."

The question of the constitutionality of Chapter 794 of the Laws of 1933 of the State of New York, which enacted Section 1083-a of the Civil Practice Act, was presented to the Special Term as well as to the Court of Appeals, by arguments and written briefs. As a result of the determination, appellant is without any remedy or means of establishing or collecting his claim against appellees for the balance due him upon his undisputed claim for moneys loaned. The question presented is a substantial one and involves the right of the New York Legislature to destroy appellant's contract rights without any adequate reason and without compensation therefor.

The Supreme Court of the United States has jurisdiction to review the decision appealed from. In *Home Building Loan Association v. Blaisdell*, 290 U. S. 398, this jurisdiction was exercised under similar circumstances.

DAVID R. J. ARNOLD,
Attorney for Appellant.



and
on
the
de
es
el
nd
on
en
ron

FILED COPY
JAN 23 1939

IN THE
Supreme Court of the United States
OCTOBER TERM, 1938.

No. 465.

ROBERT B. HONEYMAN,
Appellant,
against

ALMA CLAIRE CLARK, individually and as Executrix under the Last Will and Testament of ANNIE E. POTH, deceased, and others,
Respondents,
and

DAVID B. JACOBS and MARY V. JACOBS, his wife,
Appellees.

APPELLANT'S BRIEF

ROBERT B. HONEYMAN,
Attorney for Appellant.

INDEX.

	PAGE
OPINIONS OF COURTS BELOW.....	1
JURISDICTION.....	2
STATEMENT OF THE CASE.....	2
SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED.....	5
ARGUMENT.....	6
THE LEGISLATIVE ACT HAS IMPAIRED PLAINTIFF'S CON- TRACT.....	11

TABLE OF CASES CITED.

Adams v. Spilyards, 68 S. W. (2) 470.....	15
Alert B & L Co. v. Bechtold, 199 Atl. 734.....	15
Atlantic Loan v. Paterson, 181 Ga. 266.....	15
Beaver County Bldg. & Loan Asso. v. Winowich, 187 Atl. 481, 323 Pa. 483.....	10, 14
Bellups v. Central Life, 88 So. W. (2) 735.....	15
Bontag v. McCurdy, 59 Pa. (2) 326.....	15
Brown v. Ferdon, 54 Pac. (2) 712.....	15
City Bank Farmers Trust Co. v. Ardlea Corp., 267 N. Y. 224.....	4, 10
Fed. L. Bank v. Garrison, 193 S. E. 308.....	15
Feiber Realty Corp. v. Abel, 265 N. Y. 94.....	3, 11
Hales v. Snowden, 65 Pac. (a) 847.....	15
Home Bldg. & Loan Asso. v. Blaisdell, 290 U. S. 398.....	12
Honeyman v. Hanan, 275 N. Y. 382.....	4, 8, 9
Honeyman v. Hanan, 82 U. S. Law Ed. 254.....	8

	PAGE
Klinke v. Samuels, 264 N. Y. 144.....	1, 9
Knox v. Miggle, 196 Atl. 18.....	14
Kresos v. White, 54 Pac. (2) 800.....	15
Langever v. Hiller, 76 So. W. (2) 1025.....	15
McCracken v. Hayward, 2 How. 608.....	12
N. Y. Life Ins. Co. v. Gutttag, 265 N. Y. 292.....	11
Richmond Mtge. Co. v. Wachovia Bank, 300 U. S. 127...	14
Rutherford v. Clark, 198 N. Y. 29-33.....	11
State v. Klein, 249 N. W. 118.....	15
State of Wv. erfield, 167 O. K. 209.....	15
Stehler v. Krinks, 277 N. W. 781.....	15
Strand v. Griffith, 63 Wash. 334.....	15
Sayre v. Duffy, 13 N. J. Misc. 458, 179 Atl. 459.....	11
Texas Nat. Sec. v. Oldham, 88 So. W. (2) 621.....	15
Vanderbilt v. Brunton Piano Co., 114 N. J. L. 596, 169 Atl. 177.....	15
W. B. Worthen Co. v. Kavanaugh, 295 U. S. 638, 640...	11, 13
W. B. Worthen v. Thomas, 292 U. S. 426.....	13

TABLE OF STATUTES CITED.

United States Constitution:

Article 1, Section 10.....	12
----------------------------	----

Civil Practice Act:

Section 588, Subd. 3.....	1, 5
Section 1083-a.....	2, 3, 7, 11
Section 1083-b.....	3

New York Laws 1933:

Chapter 793.....	6
Chapter 794.....	6, 7

Supreme Court of the United States

OCTOBER TERM, 1938.

ROBERT B. HONEYMAN,

Appellant,

against

ALMA CLAIRE CLARK, individually and as
Executrix under the Last Will and
Testament of ANNIE E. POTH, deceased,
and others,

Respondents,

and

DAVID B. JACOBS and MARY V. JACOBS,
his wife,

Appellees.

No. 465.

APPELLANT'S BRIEF.

Opinions of Courts Below.

The opinion of the New York Court of Appeals on its affirmance of the final order of the Special Term of the Supreme Court is reported in 278 N. Y. 467. It will be found in the Record (p. 31).

The appeal to the New York Court of Appeals was taken directly from the determination of the Special Term of the New York Supreme Court under the provisions of subdivision 3 of Section 588 of the Civil Practice Act. The memorandum of opinion of the Supreme Court, Special Term, is not reported so far as we can find except in the New York Law Journal of June 23, 1938. It is printed in the Record (p. 27).

Jurisdiction.

The appellant filed a statement as to the jurisdiction as part of the papers presented to the Chief Judge of the Court of Appeals upon the allowance of the appeal, which statement has been printed and submitted to this Court. Upon preliminary consideration of the matter of jurisdiction we are advised that this Court has noted "probable jurisdiction."

In any further consideration of the subject, may we call attention to the fact that the judgment of the New York Court of Appeals is based upon the jurisdiction conferred upon it by Section 588 of the Civil Practice Act, subdivision 3, reading as follows: An appeal may be taken to the Court of Appeals

"as of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court."

In this case, the appeal was taken under that provision. There could be no question before the Court of Appeals save only the constitutionality of Section 1083-a of the Civil Practice Act, added by Laws of 1933, Chapter 793, under Section 10, Article 1, of the Constitution of the United States.

Statement of the Case.

This action was brought to foreclose a mortgage upon real property in Queens County, New York, executed and delivered by the appellees, David B. Jacobs and Mary V. Jacobs, on the 4th day of February, 1928, to secure the payment of their bond in the sum of \$15,000.

The complaint (Record, pp. 11-17) asks for a judgment of foreclosure and sale of the mortgaged premises and for a judgment for any deficiency which might arise upon the sale. The summons and complaint were served upon the appellees and they duly appeared in the action by their attorneys. Judgment of foreclosure and sale was entered on or about April 21, 1938, and the mortgaged premises were sold thereunder, after due public notice, on May 19, 1938, and were bid in by the appellant for the sum of \$7,500, in all respects as permitted by law and by the said judgment of foreclosure and sale (fol. 26). Thereafter, the Referee duly appointed to make the sale made his report of sale and reported that, after the payment of taxes and expenses, "there was due to the plaintiff a deficiency of Nine Thousand Five Hundred Ninety and 20/100 Dollars, with interest from the date of his report."

Up to this time the appellees did not question in any manner any of the proceedings taken by the appellant, nor did they oppose the same. Under the statutes as they existed at the time the bond and mortgage were executed, the entry of a deficiency judgment upon the confirmation of the Referee's report would follow, as a matter of course, for the amount stated by the Referee as a mere clerical act (*Feiber Realty Corp. v. Abel*, 265 N. Y. 94, citing *Morris v. Morone*, 38 N. Y. 172), and as is stated in the opinion of the Court of Appeals.

Sections 1083-a and 1083-b of the Civil Practice Act, enacted by Chapter 794 of the Laws of 1933, purport to limit the right of a mortgagee plaintiff to enter a deficiency judgment. Recognizing the propriety of these acts in so far only as they require an application to be made to the Court to direct the entry of a deficiency judgment, the appellant, under Section 1083-a, applied for an order confirming the sale and for leave to enter a deficiency judgment upon notice to the appellees (p. 4). In his moving papers, the appellant alleged (fol. 9) that "under and in accordance with the law of his contract" with the appellees, he was entitled to a judgment against them in the sum of \$9,590; and he further alleged (p. 7, fol. 9)

"that by the laws of 1933, Chapter 794, and various other acts supplemental and amendatory thereto, the legislature of the State of New York has attempted to limit deficiency judgments in foreclosure by inserting in the Civil Practice Act new sections known as 1083-a and 1083-b. That such legislative acts constitute an unreasonable interference of the plaintiff's contract rights with the defendants David B. Jacobs and Mary V. Jacobs, and are wholly unconstitutional and in violation of Article 1, Section 10, of the Constitution of the United States";

and plaintiff asked the Court for an order confirming the Referee's report of sale (p. 7) and directing the Clerk to enter judgment in favor of the appellant for the deficiency shown by the Referee's report. The appellees filed affidavits in opposition to the motion setting forth their views as to the value of the property (fols. 35-38). The Court at Special Term handed down its memorandum, which appeared in the New York Law Journal on June 22, 1938, as follows (p. 27, fol. 40):

"Lockwood, J. Application to enter a deficiency judgment for \$9,590, the full amount due, not pursuant to the provisions of the Civil Practice Act, section 1083 et seq., but upon the theory that such sections are unconstitutional as violative of section 10, article 1, of the Constitution of the United States. In view of the decision of the Court of Appeals (*Honeyman v. Hanan*, 275 N. Y. 382; *Klinke v. Samuels*, 264 N. Y. 144; *City Bank Farmers' Trust Co. v. Ardlea Corp'n*, 267 N. Y. 224), it is vain to present this contention at Special Term. Motion denied."

Thereafter the order of the Special Term (fols. 3, 4, 5) was entered confirming the Referee's report, and ordering that

"the plaintiff's application for a deficiency judgment against the defendants David B. Jacobs and Mary V. Jacobs in the sum of Nine Thousand Five Hundred and Ninety (\$9,590.00) Dollars, being the amount of deficiency as reported by the Referee in his report, or in any other sum, be and the same hereby is in all

respects denied on the grounds that the value of the property is equal to the debt of the plaintiff, and pursuant to Section 1083-a of the Civil Practice Act of the State of New York, limiting deficiency judgments, the plaintiff is deemed paid as a matter of law, which section is hereby held to be constitutional."

It is provided by Section 588 of the Civil Practice Act, subdivision 3, of the State of New York that an appeal may be taken to the Court of Appeals

"as of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court."

The appellant duly appealed to the Court of Appeals from the order of Special Term and the appeal was argued in October, 1938, and thereafter the Court of Appeals handed down its decision affirming the order and upholding the validity and constitutionality of Section 1083-a of the Civil Practice Act. The opinion is printed and annexed to this brief for convenience. It is reported in 278 N. Y. 467.

The appellant applied to the Chief Judge of the Court of Appeals (fol. 47) for leave to appeal to this Court and the application was granted.

Specifications of Assigned Errors to Be Urged.

1. The State Court erred in holding that Section 1083-a of the Civil Practice Act, enacted by the Legislature of the State of New York by Chapter 794 of the Laws of 1933, does not violate the provisions of Article I of Section 10 of the Constitution of the United States.

2. The State Court erred in holding that the Legislature of the State of New York may validly enact that a court of

the State may in foreclosure proceedings determine the value of the mortgaged premises and that the mortgagee must accept such valuation as a credit or payment upon the mortgage debt, which debt was created and existed before the passage of the act of the Legislature.

3. The State Court erred in not holding that Section 1083-a is an unreasonable violation of appellant's contract rights, without any protection of said rights or due consideration thereof and without compensation.

4. Chapter 794 of the Laws of 1933 of the State of New York is a law impairing the obligation of contracts made before the enactment of such law, in that it impairs the rights of the holders of contract obligations secured by mortgage to enforce the same and takes from such creditors their contractual right of enforcement and recovery except to the extent of the limited remedy provided by such statutes, which is a partial remedy only and less in value or extent than the contractual obligation; such impairment of the contractual rights of creditors and of the contractual obligation of debtors is in contravention of the provisions of Article I, Section 10, of the Constitution of the United States that no State shall pass any law impairing the obligation of contracts, and the State Court erred in holding that such statute was a valid exercise of legislative power by the State of New York and available to defeat appellant's recovery of judgment in accordance with the contract obligation.

ARGUMENT.

In 1933 the Legislature of the State of New York made some radical changes with respect to foreclosure of mortgages and actions on mortgage bonds. By Chapter 793 of the Laws of 1933, it enacted that during the period of a declared emergency and "notwithstanding any inconsistent provisions of the Civil Practice Act or any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon

real property nor any interest therein, nor any foreclosure under Article 17 of the Real Property Law, shall be maintainable solely for or on account of a default in the payment of the principal secured by such mortgage." Actions on bonds for principal defaults were likewise suspended. Where, however, there was a default in the payment of interest and taxes, foreclosure or action upon the bond could be maintained.

The Legislature, however, went further than merely granting a moratorium. It provided by Chapter 794 (printed and annexed to this brief for convenience) a *limitation upon deficiency judgments*. Under Section 1083-a of the Civil Practice Act (which was added by Chapter 794 of the Laws of 1933) it was provided:

"No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where an action to foreclose the mortgage has been or shall be commenced during the emergency or where the mortgaged property shall be sold during the emergency, except as herein provided. Simultaneously with the making of a motion for an order confirming the sale, or in any event, within ninety days after the date of the sale, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the

action including the referee's fee and disbursements less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.

Let us consider briefly the practical effect of this section upon a mortgagee and his rights under an ordinary mortgage. There must be a default in payment of interest and taxes, otherwise he could not foreclose his mortgage. Having the right to foreclose, because of default in interest or taxes, he necessarily proceeds by "the old and well known remedy of foreclosure"—"the classical method of realization upon mortgage security" and which has "always been understood to be fair to both parties"—and sells the property *under the order and direction of the Court*, and at such sale the property does not bring anywhere near the amount of the mortgage debt. If he does not ask the Court for a deficiency judgment within ninety days, the proceeds of the sale, regardless of the amount, *shall be deemed in full satisfaction of the mortgage debt and no right to recover any deficiency shall exist*. If he does make an application for a deficiency,

he must credit against the amount of his mortgage whatever the Court may determine to be "the fair and reasonable market value of the mortgaged premises." The provisions are not mere temporary provisions, but are permanent so far as the contract rights of the mortgagee are concerned.

The Court of Appeals of the State of New York has held that the right to a deficiency judgment *must* be determined in the foreclosure action (*Honeyman v. Hanan*, 275 N. Y. 382; appeal dismissed; see opinion in *Honeyman v. Hanan*, 82 U. S. Law Ed. 254).

It will be observed that the holder of a mortgage which is in default with interest and taxes accumulating must either forfeit all his rights under his contract or else pro-

ceed in the only method allowed him, and if he does proceed he must take in *full payment* whatever the Court may seem fit to allow *in lieu* of his contract rights.

Until the decision in this case, the New York Court of Appeals has not directly held that the Legislature has power to alter or impair a contract obligation by requiring the satisfaction in full of an admitted debt upon payment of only a part of the amount due and to take that payment in real property.

In *Honeyman v. Hanan*, 275 N. Y. 382 (appeal dismissed, U. S. Supreme Court, Dec. 20, 1937, 82 L. Ed. 254), the Court said:

"In sustaining the validity of the statutes here challenged, we should perhaps state that we are not deciding that the Legislature has power to declare that for every purpose a debt shall be 'deemed' to be satisfied though in fact the debt has not been paid or satisfied in accordance with the instrument which created it. We have given to this provision a limited application. (Cf. *Matter of City of New York [Neptune Arc.]*, 271 N. Y. 331; *Cyllene Corp v. Eisen*, 272 N. Y. 526; *Matter of City of New York [E. 29th St.]*, 273 N. Y. 62.) We hold only that reasonable limitations and restrictions may be placed upon actions to recover the debt, in order to meet conditions which constitute an imminent danger to the public welfare."

In the *Klinke* case (264 N. Y. 144), the Court said:

"As to the constitutionality of these provisions we must remember that the limitation upon the remedy in both or all instances is until July 1, 1934. There being no market for real estate of any kind, and the banks refusing to loan money on the best of real estate security owners were caught, as it were, in a trap due to conditions over which no one had control and for which no relief was at hand. Value was in the property, but the value could not be obtained nor anything like it. To prevent worse and more extensive evils and suffering the Legislature had asked through these laws for security holders to wait a rea-

sonable time for universal economic conditions to improve, provided interest and taxes are paid.

After next July all remedies, so far as these present laws apply, will again be open to the mortgage creditors.

That such legislation, reasonably seeking only temporary relief, is not unconstitutional, we may refer to our recent decision in *Matter of People* (Title & Mortgage Guarantee Co. of Buffalo) (264 N. Y. 69), and *Home Building & Loan Ass'n v. Blaisdell* (290 U. S. 398)."

In *City Bank v. Ardlea*, the primary question was whether the emergency laws applied to the guaranty in suit, and it was held that it did, and the Court then followed the *Klinke* case as to the constitutional question, which involved only the element of reasonable delay and not an absolute bar to a deficiency judgment.

In the case of *Beaver County Building & Loan Assn. v. Winowich*, 187 Atl. 481, 323 Pa. 483, the Court said:

"Under our constitutional system, however, emergency cannot create a power nor diminish restrictions. *Ex parte Milligan*, 4 Wall. 2, 120, 121, 18 L. Ed. 281; *Wilson v. New*, 243 U. S. 332, 348, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, 425, 426, 54 S. Ct. 231, 235, 78 L. Ed. 413, 88 A. L. R. 1481; *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 528, 529, 55 S. Ct. 837, 842, 79 L. Ed. 1570, 97 A. L. R. 947. A necessity that is higher than the Constitution can have no place in American jurisprudence; it can be met only by constitutional amendment. 'No doctrine,' said the court in *Ex Parte Milligan*, 4 Wall. 2, 121, 18 L. Ed. 281, 'involving more pernicious consequences, was ever invented by the wit of man than that any of its (the constitution's) provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism.'"

Section 1083-a provides that a deficiency judgment may be had *only* by the method therein prescribed, and, in effect, that the proceeds of sale or the amount allowed by the Court as the value "*shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.*" This is not merely temporary legislation. It does not secure plaintiff's rights and postpone them to a later date. It does not merely modify a remedy. It *abolishes a right*. He is forced to move for a deficiency judgment and take what the Court allows, and he is penalized if he doesn't move for the deficiency.

Plaintiff was obliged to foreclose. The property had been abandoned by the owner and by those liable on the bond, and interest and taxes were unpaid, but the necessities of the mortgagee are wholly ignored by the Legislature. If now plaintiff acquiesces in the order of the Special Term, his mortgage is "deemed paid" in full.

The Legislative Act Has Impaired Plaintiff's Contract.

Plaintiff's contract was made February 4, 1928 (fol. 46). Judge Cardozo in *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 638, 640, cited many cases in support of the proposition that "to know the obligation of a contract we look to the laws in force at its making."

See also:

Rutherford v. Clark, 198 N. Y. 29-33;

N. Y. Life Insurance Co. v. Guttay, 265 N. Y. 292, 296.

At the time the contract in suit was made, the docket of a deficiency judgment was merely a clerical act in pursuance of the direction of the judgment entered (*Feiber Realty Co. v. Abel*, 265 N. Y. 94), and was always for the deficiency reported by the Referee to sell. The Legislature could, of course, amend the Practice Act by requiring a special motion and the order of the Court to enter a deficiency judgment, but *it could not require the plaintiff to credit upon the*

contract obligation whatever sum the Court should determine to be the fair value of the property. It might, of course, refuse to confirm the sale and direct a resale, but the Court was required to sell and to credit the net proceeds received by plaintiff *and no more*. Whatever the intrinsic value of the property may be, plaintiff doesn't want it in payment, and his contract doesn't require him to take it at any price the Court sees fit to allow. What right has the Legislature or the Court to say that plaintiff is "deemed to be paid in full"—when concededly he has not been?

The Constitution of the United States states:

"No state shall * * * pass any * * * law impairing the obligations of contract. * * *"
Art. 1, Sec. 10).

In *McCracken v. Hayward*, 2 How. 608 (1844), it is stated (p. 612):

"* * * The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. * * * If any subsequent law affects to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favour of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

In the case of *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398 (1934), the Court said (p. 431):

"The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them (*Sturges v. Crowninshield*, 4 Wheat. 122 [1819], pp. 197, 198) and impairment, as above

noted, has been predicated by laws which without destroying contracts derogate from substantial contractual rights."

In *W. B. Worthen Co. v. Thomas*, 292-U S. 426, the Court, referring to the *Blaisdell* case, said (pp. 433-434) :

"In *Home Bldg. & L. Asso. v. Blaisdell* (290 U. S. 434), we held that 'the reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debt or the destruction of contracts or the denial of means to enforce them' * * * and 'when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency. Accordingly, in the *Blaisdell* case we sustained the Minnesota mortgage moratorium law in the light of the temporary and conditional relief which the legislation granted. We found that relief to be reasonable, *from the standpoint of both mortgagor and mortgagee, and to be limited to the exigency to which the legislation was addressed.*

'In the instant case, the relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances, or need. We find the legislation as here applied to be a clear violation of the constitutional restriction.'" (Italics ours.)

In *W. B. Worthen Co. v. Kavanaugh*, the Court unanimously said :

"Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage, without moderation or reason, or in the spirit of oppression, even when the public welfare is involved as an excuse, their bounds must be respected."

and condemned the Arkansas legislative acts as unconstitutional, distinguishing the *Blaisdell* case.

In *Richmond Mortgage Co. v. Wachovia Bank*, 300 U. S. 127-129, this Court said:

"The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but, in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right. The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away. The matter in dispute is whether the questioned enactment falls beyond the boundary or permissible regulation of the remedy for enforcement of the appellant's contract."

In the case of *Beaver County Building & Loan Assn. v. Winovich*, 323 Pa. 483, 187 Atl. 481, there was under consideration the Pennsylvania Mortgage Deficiency Act (1934), and it was held unconstitutional as to mortgages contracted before its enactment because of the constitutional provision prohibiting the impairment of obligations of contracts. Under the laws of Pennsylvania in effect at the time of the enactment of the statute, a mortgagee was entitled to a deficiency judgment in an amount equal to the amount of the mortgage debt, interest and costs, after deducting therefrom the net proceeds of a foreclosure sale. The Act under consideration provided for a deficiency judgment in an amount fixed by deducting the fair value of the property instead of the proceeds of the foreclosure sale. The Court in a long opinion reviewed many cases and held the Act to be unconstitutional.

To the same effect is the later case of *Knorr v. Migale*, 196 Atl. 18.

In *Sayre v. Duffy*, 13 N. J. Misc. 458, 179 Atl. 459, the New Jersey statute, Chapter 82 of the Laws of 1933, providing that the Court should determine the amount of the deficiency in mortgage foreclosures by deducting from the

amount of the debt the fair market value of the premises, was held to be unconstitutional, the Court saying:

"The effect is not to delay the remedy but to abrogate completely the rights of the mortgagee to a deficiency judgment."

Vanderbilt v. Brunton Piano Co., 111 N. J. L. 596, 169 Atl. 177, likewise holds the New Jersey statute unconstitutional.

Alert B & L Co. v. Bechtold, 199 Atl. 734, holds the amended New Jersey statute likewise unconstitutional.

In *California* the limitation of deficiency judgments to the difference between the debt and the fair market value is held unconstitutional. *Hales v. Snowden*, 65 Pac. (a) 847; *Brown v. Ferdon*, 54 Pac. (2) 712.

In *Arizona* the right to a deficiency judgment is a vested right under the contract and a statute taking it away is unconstitutional. *Kresos v. White*, 54 Pac. (2) 800; *Bontag v. McCurdy*, 59 Pac. (2) 326.

Various State Courts have reached a similar conclusion.

Nebraska—*Stehler v. Krinks*, 277 N. W. 784;

Georgia—*Atlantic Loan v. Paterson*, 181 Ga. 266;

Arkansas—*Adams v. Spilyards*, 68 S. W. (2) 470;

North Dakota—*State v. Klein*, 249 N. W. 118;

Oklahoma—*State v. Waterfield*, 167 O. K. 209;

South Carolina—*Fed. L. Bank v. Garrison*, 193 S. E. 308;

Texas—*Langerer v. Hiller*, 76 So. W. (2) 1025;

Texas Nat. Sec. v. Oldham, 88 So. W. (2) 621;

Bellups v. Central Life, 88 So. W. (2) 735;

Washington—*Strand v. Griffith*, 63 Wash. 334.

Respectfully submitted,

ROBERT B. HONEYMAN,

Attorney for Appellant.

Opinion of the Court of Appeals.

COURT OF APPEALS.

ROBERT B. HONEYMAN,

Appellant,

vs.

**ALMA CLAIRE CLARK, individually, &c., and
others, defendants,**

and

**DAVID B. JACOBS and MARY V. JACOBS,
his wife,**

Respondents.

Per Curiam:

The plaintiff has brought an action for the foreclosure of a mortgage upon real property in Queens County, executed and delivered by the defendants, David B. Jacobs and Mary V. Jacobs, on the 4th day of February, 1928, to secure the payment of their bond in the sum of \$15,000. The plaintiff asks for a judgment of foreclosure and sale of the mortgaged premises and for judgment for any deficiency which may arise upon such sale. Judgment of foreclosure and sale was entered in April, 1938, and the mortgaged premises were sold in May, 1938, to the plaintiff for the sum of \$7,500. The referee reported that after payment of taxes and expenses "there is due to the plaintiff a deficiency of \$9,590.21 with interest from the date of this report." Under the statute as it existed at the time the bond and mortgage were executed, the plaintiff would have been entitled to a judgment for that deficiency.

Sections 1083 a and b of the C. P. A. enacted thereafter purport to limit the right of the plaintiff to enter a deficiency judgment. The plaintiff, alleging "that such legislative acts constitute an unreasonable interference to the plaintiff's contract rights with the defendants, David B. Jacobs and Mary V. Jacobs, and are wholly unconstitutional and in violation of Article 1, Section 10 of the Constitution of the United States," has applied to the court for an order confirming the referee's report of sale and directing the clerk to enter in his favor judgment against the said defendants in the sum of \$9,590. The plaintiff appeals to this court from an order of Special Term which provides that the application for a deficiency judgment "is in all respects denied on the grounds that the value of the property is equal to the debt of the plaintiff, and pursuant to Section 1083-a of the Civil Practice Act of the State of New York, limiting deficiency judgments, the plaintiff is deemed paid as a matter of law, which section is hereby held to be constitutional." The appeal is taken direct to this court pursuant to the provisions of Section 588, subdivision 3, C. P. A., and the only question which may be considered on this appeal is the validity of Section 1083-a under the Constitution of the United States. We have, in other cases, sustained its validity (*Honeyman v. Hanan*, 275 N. Y. 382; *Klinke v. Samuels*, 264 N. Y. 144; *City Bank Farmers Trust Co. v. Ardlea Corp.*, 267 N. Y. 224).

Order affirmed without costs.

Laws of New York of 1933,

"Chapter 794.

"AN ACT to amend the civil practice act, in relation to deficiency judgments in actions to foreclose mortgages on real property and actions to recover judgments on bonds secured by mortgages on real property

"Became a law August 28, 1933, with the approval of the Governor Passed, on message of necessity, three-fifths being present.

"The People of the State of New York, represented in Senate and Assembly, do enact as follows:

"Section 1. It is hereby declared that a serious public emergency affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

"§2. The civil practice act is hereby amended by inserting therein two new sections, to be sections ten hundred and eighty-three-a and ten hundred and eighty-three-b, as follows:

"1083-a. LIMITATION UPON DEFICIENCY JUDGMENTS DURING EMERGENCY PERIOD. No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where the mortgaged property shall be sold during the emergency, except as herein provided. Simultaneously with the making of a motion for an order confirming the sale or in any event within ninety days after the date of the sale, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have ap-

peared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.

“§1083-b. Judgments in actions on bonds. In any action pending at the time this section as hereby added takes effect, or hereafter commenced during the emergency, other than an action to foreclose a mortgage, to recover a judgment for any indebtedness secured by a mortgage on real property and which originated simultaneously with such mortgage and which is secured solely by such mortgage, against any person or corporation directly or indirectly or contingently liable therefor, any party against whom a money judgment is demanded, shall be entitled to set off the fair and reasonable market value of the mortgaged property less the amounts owing on prior liens and encumbrances. In any action to foreclose the mortgage commenced after the emergency as defined by the law shall have expired, a deficiency judgment may be recovered as though this section had not been enacted but the amount of any money judgment recovered as provided in this section shall be deducted in computing such deficiency judgment.

"3. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part hereof.

"4. The period of the emergency hereby declared shall be from the date this act takes effect until July first, nineteen hundred thirty-four. This act shall not apply to mortgages dated on or after July first, nineteen hundred thirty-two, or to any bond, collateral bond, guarantee, or extension agreement or other agreement or writing concerning or delivered in connection with any indebtedness secured by a mortgage dated on or after July first, nineteen hundred thirty-two."



IN THE
Supreme Court of the United States

OCTOBER TERM 1938

No. 465

ROBERT B. HONEYMAN,

Appellant,

against

ALMA CLAIRE CLARK, individually and as Executrix under
the Last Will and Testament of ANNIE E. POTH, de-
ceased, and others,

Respondents.

and

DAVID B. JACOBS and MARY V. JACOBS, his wife,

Appellees.

APPELLEES' BRIEF

JOHN J. BENNETT, JR.,

*Attorney General of the
State of New York,*

Attorney for Appellees.

HENRY EPSTEIN,

Solicitor General.

JOHN F. X. MCGOHEY,

BENJAMIN HEFFNER,

Assistant Attorneys General,


Of Counsel.



INDEX

	PAGE
JURISDICTION	1
OPINIONS OF THE COURTS BELOW	1
STATEMENT OF THE CASE	2
POINT I—Sections 1083a and 1083b (Ch. 794, L. 1933) do not vary or impair the obligations of appellant's mortgage contract	4
POINT II—Chapter 794 of the Laws of 1933 is a valid exercise of legislative power	10
A. The Legislature had ample power to enact Sections 1083a and 1083b of the Civil Prac- tice Act	12
B. The emergency which compelled the legisla- tive action in Chapter 794 of the Laws of 1933	13
C. The reasonableness of the statute	15
D. The provisions of the statute are limited "to the exigency which called it forth"	17
POINT III—The judgment of the New York State Court of Appeals should be affirmed	19
APPENDIX—Commonly Known Facts of the Mortgage Emergency in New York	20
Table I	20
Table II	20
Table III	21
Table IV	25
Table V	26

MICRO CARD 22

TRADE MARK 



MICROCARD[®]
EDITIONS, INC.

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY SIXTH STREET, N.W. WASHINGTON, D.C. 20037, PHONE (202) 333-6393

520

38-66



TABLE OF CASES

	PAGE
Atchison, T. & S. F. R. Co. v. U. S., 284 U. S. 248, 260	13
Bernheimer v. Converse, 206 U. S. 516, 530	9, 10
Better Plan Building & Loan Association v. Holden, 114 N. J. Eq. 537; 169 Atl. 289	4
Block v. Hirsch, 256 U. S. 135	18
Campbell v. Holt, 115 U. S. 620	17
Chicago Railroad etc. v. Wellman, 143 U. S. 339, 346	17
City Bank Farmers Trust Company v. Ardlea Corp., • 267 N. Y. 224	16, 18
Crane v. Hablo, 258 U. S. 142, 147	9
Graffam v. Burgess, 117 U. S. 180, 191, 192	4
Guaranteed Title & Mortgage Company v. Scheffres, 247 App. Div. 294	5
Heiman v. Bishop, 272 N. Y. 83	10, 16, 17
Highland v. Russell Car etc. Company, 279 U. S. 253	17
Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 446	4, 9, 10, 15, 17, 18, 19
Honeyman v. Hanan, 275 N. Y. 382 (appeal dis- missed, 302 U. S. 375)	16
Klinke v. Samuels, 264 N. Y. 144	14, 16
Kurtz et ux. v. Ferrante et al., 243 App. Div. 739	5
Lexy Leasing Company v. Siegel, 258 U. S. 242	18
Louisville Bank v. Radford, 295 U. S. 920	17
Louisville Trust Company v. Louisville etc. Railway, 174 U. S. 674, 688, 689	5
Marcus Brown Company v. Feldman, 256 U. S. 170	18

	PAGE
Matter of People (Title & Mortgage Guaranty Co.), 264 N. Y. 69, 85.....	14
Monaghan v. May, 242 App. Div. 64.....	5
Oshkosh Water Works Company v. Oshkosh, 187 U. S. 437, 439.....	9
Patapasco Guano Co. v. Board of Agriculture, 171 U. S. 345	17
Red River Valley Bank v. Craig, 181 U. S. 548.....	9
Richmond Mortgage & Loan Corp. v. Wachovia Bank, 300 U. S. 127, 129.....	4, 8, 9, 10, 12, 17, 19
Suring State Bank v. Giese, 210 Wis. 489.....	4
Waggoner v. Flack, 188 U. S. 595, 602, 603.....	9
Wilson v. Standefer, 184 U. S. 399.....	9
Worthen Company v. Kavanaugh, 295 U. S. 56.....	17
Worthen Company v. Thomas, 292 U. S. 426.....	17
Young v. Weber, 117 N. J. Eq. 242, 175 Atl. 273.....	8, 14

TABLE OF STATUTES

	PAGE
Civil Practice Act:	
Section 1077b	18
Section 1083	2, 4, 5, 7, 8
Section 1083a	2, 3, 4, 12
Section 1083b	2, 4, 12
Laws of 1933 of New York:	
Chapter 793	18
Chapter 794	1, 2, 4, 5, 7, 8, 9, 10, 14, 15, 16, 17, 18, 19
Laws of 1937 of New York:	
Chapter 83	18
United States Constitution:	
Article I, Section 10	2, 3, 9, 10

MISCELLANEOUS

Clark, The Internal Debts of the United States (20th Century Fund, 1933)	13
New York Herald Tribune, December 30, 1934	13

IN THE
Supreme Court of the United States

OCTOBER TERM 1938

No. 465

ROBERT B. HONEYMAN,

Appellant,

against

ALMA CLAIRE CLARK, individually and as Executrix under
the Last Will and Testament of ANNIE E. POTH, de-
ceased, and others,

Respondents,

and

DAVID B. JACOBS and MARY V. JACOBS, his wife,

Appellees.

APPELLEES' BRIEF.

Jurisdiction.

The appellant heretofore duly filed a statement as to jurisdiction. Probable jurisdiction was noted by this Court on December 5, 1938.

Opinions of the Courts Below.

The opinion of the New York State Court of Appeals in this case is reported in 278 N. Y. 467 and is found in the record at pages 31 and 32. It holds that Chapter 794 of the Laws of 1933 of New York is not in violation of the United States Constitution. This was the sole question raised on the appeal.

The appeal to the Court of Appeals was directly from a final order of a Special Term of the New York Supreme Court, pursuant to law. —A memorandum of opinion by the Special Term is found in the record at page 27.

Statement of the Case.

The action here was one to foreclose a mortgage, upon real property, executed and delivered by the appellees on February 4, 1928, to secure payment of their bond in the sum of \$15,000. The bond and mortgage were subsequently extended in 1931. In 1936, the mortgaged premises were conveyed to respondent Clark, who is not an appellee because no application for judgment was made against her. The respondent Clark defaulted in the payment of interest, taxes and maintenance of fire insurance. Summons and complaint were served upon appellees and respondent. Appellees appeared in the action by their attorneys. Respondent Clark did not appear.

Judgment of foreclosure and sale was entered on April 21, 1938. Thereafter, a sale was held and the property was bought in by the appellant, plaintiff in the foreclosure action, for \$7,500.

The difference between the mortgage debt plus disbursements, costs and allowance and the amount of appellant's bid was \$9,590.

Appellant then moved for an order directing a deficiency judgment to be entered in his favor against the appellees for \$9,590, "under the law of his contract" (R. p. 6, fol. 9), and alleged that Sections 1083a and 1083b of the Civil Practice Act (Ch. 794, L. 1933) violated his rights under Section 10 of Article I of the United States Constitution.

By "the law of his contract", appellant presumably meant Section 1083 of the Civil Practice Act, which was

in force at the time of the making of the bond and mortgage, namely, February 4, 1928, and which prescribed the procedure for obtaining a deficiency judgment. The challenged sections were enacted in 1933 and were in force when this action was commenced in February, 1938.

Under Section 1083a C. P. A., the Court on motion is required to determine, upon affidavits or otherwise as it shall direct, the fair and reasonable market value of the mortgaged property as of the date of sale in foreclosure or such nearest earlier date as there shall have been any market value therefor. The deficiency judgment shall be made for the amount claimed by the plaintiff less the value of the property as so determined, or the sale price thereof, whichever is higher.

Appellant offered no evidence as to the value of the property on the motion. Appellees offered evidence in the form of an affidavit to show that the property was worth \$25,318.

The Court, at Special Term, entered its order denying the motion for deficiency judgment on the ground that the value of the property was at least equal to the plaintiff's debt and that the plaintiff was deemed paid as a matter of law. The Court also held the challenged statute to be constitutional. On appeal directly to the Court of Appeals, that Court held that the statute does not impair the obligation of the appellant's mortgaged contract in violation of Article I, Section 10 of the United States Constitution.

This appeal is from that determination.

The Attorney General of New York was substituted for the original attorneys for the appellees upon consents of both the attorneys and the appellees. He appears in this appeal in order to defend the constitutionality of the challenged statute.

4

POINT I

Sections 1083a and 1083b (Ch. 794, L. 1933) do not vary or impair the obligations of appellant's mortgage contract.

At the time of the execution of the instrument sued on, Section 1083 of the Civil Practice Act governed proceedings to secure deficiency judgments in foreclosure. That section provided:

"If a person who is liable to the plaintiff for the payment of a debt secured by the mortgage is made a defendant in the action and has appeared or has been personally served with the summons, the final judgment *may* award payment by him of the residue of the debt remaining unsatisfied after a sale of the mortgaged property and the application of the proceeds pursuant to the directions contained therein." (Italics ours.)

Sections 1083a and 1083b (Ch. 794, L. 1933) were passed subsequent to the making of appellant's contract.

The inherent power of equity has long been recognized to prevent gross inadequacy of price and excessive hardship and injury in foreclosure proceedings.

Richmond Mortgage & Loan Corp. v. Wachovia Bank, 300 U. S. 127, 129.

Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 446.

Graffam v. Burgess, 117 U. S. 180, 191, 192.

Suring State Bank v. Giese, 210 Wis. 489.

Better Plan Building & Loan Association v. Holden, 114 N. J. Eq. 537; 169 Atl. 289.

The Court is not a mere mechanical enforcing agency of the bare terms of mortgage agreements. It must protect and enforce all the equities involved.

Louisville Trust Company v. Louisville etc. Railway, 171 U. S. 674, 688, 689.

The decisions of the New York Courts, just as the cases above cited, clearly establish that the appellant had no absolute or vested right under Section 1083 C. P. A. to a judgment for the full difference between the proceeds of the foreclosure sale and the mortgage debt.

Monaghan v. May, 242 App. Div. 64.

Guaranteed Title & Mortgage Company v. Schefres, 247 App. Div. 294.

Kurtz et al. v. Ferrante et al., 243 App. Div. 739.

In *Monaghan v. May*, *supra*, the mortgages foreclosed aggregated \$24,077.55. Plaintiff, the mortgagee, bid in the property for the sum of \$5,000 and moved to confirm the referee's report of sale and for a deficiency judgment of \$19,791.71. Leave to enter a deficiency judgment was denied on the ground that the value of the mortgaged property in the hands of the mortgagee equaled the mortgage debt and completely satisfied it. The Court held that Section 1083 of the Civil Practice Act, providing that the Court *may* grant a deficiency judgment, is not mandatory, but leaves it within the discretion of a court of equity to grant or withhold such relief. The sale of the property in that case was held shortly before the passage of Chapter 794 of the Laws of 1933. The decision of the Appellate Division was made subsequent to the passage. In answer to the argument that Chapter 794 did not apply to that action the Court said in part:

"The Legislature has declared that an emergency exists, fixed the period thereof, and declared that cer-

tain remedies available to mortgages (inter alia, in respect, to deficiency judgments) shall be subject to limitations during that period. These enactments 'provide procedure and relief which are cognate to the historic exercise of equitable jurisdiction.' Equity is not circumscribed by these statutory dates if the emergency in fact had an earlier origin. These enactments do not deprive a court of equity of its inherent power to place limitations upon the remedies available to a mortgagee in consonance with fundamental doctrines of equity. (*Clinton Trust Co. v. 142-144 Lorain St. Street Corp.*, 237 App. Div. 789.) A court of equity may do this during such times as it deems are within the period of economic stress and emergency, which period may be equal to or greater than that fixed by the Legislature.

When the Legislature spoke, mortgagors and mortgagees learned, earlier than they would have if left to the results of invoking judicial power, that continued abnormal economic conditions would not be permitted to unjustly oppress the borrower. *But the judicial power to effect the same result has always been and still is there, responsive to a proper case for its exercise—apart from the statutory declarations*" (pp. 65 and 66).

* * * * *

"In exercising its statutory jurisdiction, a court of equity will be guided by equitable principles. To obtain a deficiency judgment and determine the amount thereof, it is necessary to invoke equitable power to confirm the sale had under the judgment of foreclosure. When seeking affirmative judicial action in equity, one may not succeed if one is asking an inequitable or unconscionable result. Equity may refuse to confirm such a sale where it has produced an inadequate price" (pp. 66 and 67).

* * * * *

"The court found that the mortgagee was the purchaser at a price that was so inadequate as to shock the conscience of the court. It concluded to treat the

price as merely nominal and to confirm the report in view of its further finding that the true value of the property in plaintiff's hands was equal to the amount of the mortgage debt. This made it equitable to confirm the report of sale, since the property vested in the mortgagee and fully satisfied the mortgage debt. This procedure constituted the mortgage debt as the real price on the sale. *The court having the power to refuse to confirm the report of sale because the price was inadequate, it likewise had the kindred power to refuse to authorize the entry of a deficiency judgment based on such a sale and computed on such an inadequate or nominal price base. The court thus merely declined to exercise its statutory jurisdiction except where its powers in this regard are invoked to do equity. If the property did not equal in value the mortgage debt, then equity would require the granting of a deficiency judgment; but that is not this case*" (p. 67).

.

"No rights rest, perforce the judgment of foreclosure, in plaintiff for a deficiency judgment in any amount until plaintiff satisfies a court of equity that it would be equitable and just, as a consequence of what has occurred on the sale, to authorize the entry of a deficiency judgment" (p. 67). (Italics ours.)

Appellant's right to a deficiency judgment was thus subject, before the enactment of Chapter 794, to the provisions of Section 1083 of the Civil Practice Act and to the inherent power of equity to refuse to grant him anything beyond the satisfaction of his debt. Chapter 794 recognized that conditions of hardship were no longer occasional but, indeed, universal. In so doing it merely directed that in all cases of foreclosure during the limited period of the emergency, necessitous circumstances compelled that deficiency judgments be subjected to judicial scrutiny and that equitable principles be applied to all persons applying for them.

It is apparent that not even the remedies of the appellant were affected by the challenged statute. Appellant's remedy was always subject to the inherent power of equity to deny a deficiency judgment and Chapter 794 merely enlarged the group of cases in which equitable defenses and principles would be applied.

Appellant will undoubtedly contend that his constitutional right is not subject to such an enlargement. He contends that his contract embraced by implication only the remedies and procedure provided in said Section 1083 of the Civil Practice Act.

This Court has said that a mortgage contract contemplates that the lender could make himself whole, if necessary, out of the security, not that he should be enriched at the expense of the borrower or realize more than what would repay the loan with interest.

Richmond Mortgage & Loan Corp. v. Wachovia Bank; supra.

This principle arises out of the ancient equitable maxim that "equity will not suffer a double satisfaction to be taken". In *Young v. Weber*, 117 N. J. Eq. 242, 175 Atl. 273, there was quoted with approval an earlier case, in which it was said, "Satisfaction of the debt and not pillage of the debtor's estate is equity's relief." It would be difficult to find a better example of unjust enrichment than in the present case. Here is a piece of property valued by competent and uncontradicted testimony at more than \$25,000. The entire amount of the mortgage debt, costs and expenses totalled \$17,190 (p. 9). Appellant's bid in the foreclosure sale was \$7,500 and was the only bid received. The appellant asks this Court to award him a piece of property valued at \$25,000, plus a judgment of \$9,590, a total of more than \$35,000, to satisfy a \$17,000 debt. It is apparent that any court of equity would readily refuse such a demand as uncon-

reasonable even without the statute to which objection is made.

The People of the State of New York contend that, since no person had an absolute right to a deficiency judgment prior to the passage of Chapter 794, no contractual right is lost or impaired by a statute which only defines or limits a right which is conditional, not absolute.

No one has a vested right to particular remedies or procedures, even though they are in existence when contracts are made.

Oshkosh Water Works Company v. Oshkosh, 187 U. S. 437, 439.

Richmond Mortgage & Loan Corp. v. Wachovia Bank, 300 U. S. 127.

The remedies available to enforce a contract may be enlarged, modified or restricted without doing violence to Article I, Section 10 of the Constitution.

Waggoner v. Flack, 188 U. S. 595, 602, 603 (Statute changed contract so as to give state previously non-existent right of forfeiture of contract).

Bernheimer v. Converse, 206 U. S. 516, 530 (Statute gave receivers rights to sue non-resident stockholders).

Red River Valley Bank v. Craig, 181 U. S. 548 (Change in law as to rights of lienors to compel sale of land as against mortgagee).

Wilson v. Standerfer, 184 U. S. 399 (Permitted forfeiture of land contracts by the state without judicial proceedings).

Crane v. Haklo, 258 U. S. 142, 147 (Changed method of review in condemnation cases from general review to a very limited form of review).

Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 429, 430 (Permitted the extension

of the period of redemption in mortgage foreclosures).

Richmond Mortgage & Loan Corp. v. Wachovia Bank, 300 U. S. 127 (Permitted defendant in foreclosure to show, by way of defense and set-off, that property was worth the amount of the mortgage debt).

The principle underlying Chapter 794 is analogous to that stated in the case of *Bernheimer v. Converse*, *supra*, at page 530.

Chapter 794 makes more universally enforceable pre-existing equitable remedies, just as the statute made more universally enforceable the remedies in the *Bernheimer* case.

It cannot be said that such alteration of procedure deprives appellant of his right to a deficiency judgment. In the first place, there is no *absolute* right. In the second place, he may even now have a deficiency judgment if the value of the property is insufficient to make him whole.

See *Heiman v. Bishop*, 272 N. Y. 83.

That Chapter 794 was in response to public need and legitimately addressed to those needs is more fully discussed in a succeeding portion of this brief.

POINT II

Chapter 794 of the Laws of 1933 is a valid exercise of legislative power.

The pertinent constitutional questions as to the validity of Chapter 794 of the Laws of 1933 under Article I, Section 10 of the Constitution, were discussed fully by this Court in *Home Building & Loan Association v. Blaisdell*,

290 U. S. 398. In that case this Court declared certain established principles of constitutional law:

FIRST: The police power of a state may be exercised directly to prevent the immediate and literal enforcement of contractual obligations by temporary and conditional restraint where vital public interests would otherwise suffer (pp. 440, 436, 437).

SECOND: Though emergencies do not create legislative power, they furnish the occasion for the exercise of that power (p. 426).

THIRD: The question in such cases is whether the emergency and the legislation bear to each other some just, legitimate and reasonable relation (p. 426).

FOURTH: The economic interests of the state may, through the police power, justify the interference of its dominant power notwithstanding interference with contracts (p. 437).

FIFTH: "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order" (p. 435).

SIXTH: The facts found by the Legislature are presumed to be true in the absence of patent invalidity or proof to the contrary. Further, economic facts of common knowledge may be considered by the Court in determining if there exists the emergency which occasioned the exercise of the power (p. 444). (Commonly known facts of the mortgage emergency in New York appear in Appendix.)

A. The Legislature had ample power to enact Sections 1083a and 1083b of the Civil Practice Act,

This Court, in *Richmond Mortgage & Loan Corp. v. Wachovia Bank*, 300 U. S. 127, held that a state has the power to permit a defendant, in a foreclosure action, to show, by way of defense and set-off, that the property sold is worth the amount of the mortgage debt or, on the other hand, that the sum bid is substantially less than the true value of the property and thus defeat the claim for deficiency judgment in whole or in part. In that case, the mortgage affected was executed prior to the passage of the statute involved. Furthermore, the statute was not for a specified period of emergency, but was made a part of the permanent legislation of North Carolina.

The *Richmond* case, we submit, is a complete answer to appellant's contention that New York State had no power to pass Sections 1083a and 1083b of the Civil Practice Act. The purpose and effect of the New York statute are precisely the same as those of the statute in the *Richmond* case. Furthermore, the operation of the New York statute was limited only to the period of emergency.

While it is true that the *Richmond* case applied only to situations in which the holder of the mortgage was the purchaser at the foreclosure sale, in practical effect there is no distinction between the New York statute and the North Carolina statute there passed upon. In the present case, the holder of the mortgage was the purchaser. Furthermore, as may be seen by Appendix Table IV, only two percent of sales in foreclosure were made to persons other than holders of the mortgage. It is safe to assume that even as to this two percent, a large portion of sales to persons other than the holder of the mortgage were instances in which a second mortgagee bought

in to protect his junior lien. Prospective buyers know that a mortgagee can bid up to the value of his debt without having to make any cash outlay. Therefore, persons who might otherwise be buyers stay away from foreclosure sales.

B. The emergency which compelled the legislative action in Chapter 794 of the Laws of 1933.

The depression "is the outstanding contemporary fact, dominating thought and action throughout the country".

Atchison, T. & S. F. R. Co. v. U. S., 284 U. S. 248, 260.

The largest item in the internal national debt account in 1932 was the mortgage burden on the country's real estate.

Clark, The Internal Debts of the United States (20th Century Fund, 1933), p. 6 et seq.

The urban mortgage debt burden increased by more than 300% from 1922 to 1929.

Clark, op. cit., supra, p. 16.

And of the total national mortgage debt of approximately \$35,000,000,000 in 1932, it has been estimated that almost 30% was secured by New York real estate.

Clark, op. cit., supra, p. 5.

New York Herald Tribune, December 30, 1934, p. 2.

In 1932, when the epidemic of forced sales through foreclosure reached its peak, properties foreclosed were more than six times the number of those foreclosed in 1928.¹ The assessed valuations of foreclosed properties in the

¹ See Appendix Table I.

Borough of Manhattan in the City of New York in 1932 were \$252,550,500 as compared with assessed values of foreclosed properties of \$39,332,000 in 1928.² Of the properties foreclosed 91.6 were income producing.³ Table II shows the various types of buildings which were subjected to foreclosure in the period from 1928 to 1932.

The Courts of New York took judicial notice of the sudden change in economic conditions which resulted in widespread damage to real estate investors.⁴

Matter of People (Title & Mortgage Guaranty Co.),
264 N. Y. 69, 85,

Klinke v. Samuels, 264 N. Y. 144.

The situation before the Legislature disclosed that in the period of stress immediately preceding the passage of Chapter 794, property owners were not only faced with the loss of their properties but with the imposition of a terrific burden in the form of deficiency judgments. Not only were these deficiency judgments large in amount, but the deficiencies had no actual relation to the difference in value between the properties acquired in foreclosure and the amount due the mortgagee. The effect was not only to satisfy the mortgagee's debt, but to pillage the debtor's estate (*Young v. Weber*, 117 N. J. Eq. 242).

In Appendix Table III, the relationship between the sum bid in the foreclosure sale, the mortgage debt, the resultant deficiency judgment and the assessed valuation of the properties foreclosed is shown. The amount bid at the foreclosure sale is 10.44% of the value of the property as assessed for tax purposes in the eight months' period immediately preceding the passage of Chapter 794, Laws of 1933. Furthermore, it appeared that practically

² See Appendix Table I.

³ See Appendix Table II.

no one other than the mortgagee was bidding in at these foreclosure sales (see Appendix Table IV). There was a total absence of any competition. As a result, any bid, however nominal, secured the sale at the auction room.

Under such circumstances, the situation became one in which mortgagees had within their grasp the possibility of double satisfaction. They were securing property worth in most cases the amount of the mortgage debt and, in addition, a deficiency judgment for practically the full amount of the debt (see Appendix Table III).

With these facts before it, the Legislature enacted Chapter 794 of the Laws of 1933.

The declaration of emergency included in Section 4 of Chapter 794 recites the existence of conditions which in view of the circumstances indicated herein justified the enactment. Their findings may not be lightly set aside.

Home Building & Loan Association v. Blaisdell,
supra, at p. 444.

C. The reasonableness of the statute.

Chapter 794 of the Laws of 1933 does not prohibit deficiency judgments. It requires that established equitable principles be applied in each instance where an application for a deficiency judgment is made. The actual value of the property is set off against the debt. A deficiency judgment is denied only where that value is equal to or greater than the debt. If that value is less than the debt, the judgment must be for the difference between the two.

It is manifestly not unreasonable to require this offset in view of the fact that over 90% of the property involved in foreclosures between 1928 and 1932 was income producing (see Appendix Table II).

In Appendix Table V, the operation of Chapter 794 is shown. Of 223 applications for deficiency judgments made by the Mortgage Commission of the State of New York, 70 resulted in a denial of the application, and in the remaining 153 cases, deficiency judgments, varying from less than 3% to nearly 100% of the mortgage debt, were obtained. It appears that the statute merely results in more equitable deficiency judgments.

When the mortgagee makes his application for a deficiency judgment, the Court determines upon affidavit or other proof the fair and reasonable market value of the mortgaged premises as of the date of sale. In making this appraisal the Court must receive evidence

"of the age and construction of the buildings on the premises, the rent received therefor, assessed value, location, condition of repair, the sale price of property of a similar nature in the neighborhood; conditions in the neighborhood which affect the value of the property therein, accessibility, and all other elements which may be fairly considered as affecting the market value of real property in a given neighborhood."

Heiman v. Bishop, 272 N. Y. 83, 88.

This statute was held to be constitutional by the New York State Court of Appeals in the cases of *Klinke v. Samuels*, 264 N. Y. 144; *City Bank Farmers Trust Company v. Ardlea Corp.*, 267 N. Y. 224; *Honeyman v. Hanau*, 275 N. Y. 382 (appeal dismissed, 302 U. S. 375), as well as in this case.

The right which appellant claims to be deprived of is the right, in a foreclosure sale, to receive property whose value is equal to or in excess of the mortgage debt and, in addition, a deficiency judgment in an amount nearly equal to the mortgage debt.

The determining test in any case involving police power is whether or not the public benefit outweighs the resulting burden on individual interests. The burden upon the mortgagee under Chapter 794 is a requirement that he receive no more than that which is due him from the mortgagor. Such a "right" to double enrichment as the appellant here urges is unconscionable. The Constitution guarantees to no one the right to exploit or to take an unconscionable advantage of another.

Chicago Railroad etc. v. Wellman, 143 U. S. 339, 346.

Highland v. Russell Car etc. Company, 279 U. S. 253.

Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345.

Campbell v. Holt, 115 U. S. 620.

"The statute recognizes the obligation of his contract and his right to its full enforcement but limits that right so as to prevent his obtaining more than is his due." (*Richmond Mortgage & Loan Corp. v. Wachovia Bank*, 300 U. S. 127, 130.)

D. The provisions of the statute are limited "to the exigency which called it forth".

In accordance with the principles laid down in *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, and reiterated thereafter in *Worthen Company v. Thomas*, 292 U. S. 426; *Worthen Company v. Kavanaugh*, 295 U. S. 56, and *Louisville Bank v. Radford*, 295 U. S. 920, the relief sought to be afforded by this statute is limited strictly to the duration of the emergency and is based on reasonable terms (See Appendix Table V and *Heiman v. Bishop*, *supra*). The emergency period of Chapter 794 was ex-

tended for one year from 1937 to 1938 by Chapter 83 of the Laws of 1937.

Not only does the statute provide for the relief to be limited strictly to the duration of the emergency periods of one year each, but in addition provides an alternative remedy, the use of which relieves a mortgagee from any hardship which he may feel is imposed upon him by the statute.

In a case such as the instant one, where an independent action is being brought upon the collateral bond, there is no necessity for bringing the action during the period of the emergency. The Statute of Limitations does not run against the appellant during the emergency (Section 1077f, Civil Practice Act, and see *City Bank Farmers Trust Company v. Ardlea*, 267 N. Y. 224, holding that Chapter 794 and Chapter 793, of which Section 1077f is a part, must be read together). To this extent, the statute merely sets up a limited postponement of the "right" to a deficiency judgment similar to the suspension expressly approved in the *Blaisdell* case.

Appellant argues that he is being deprived of a deficiency judgment permanently. He claims that once a deficiency judgment is denied to him, it is lost forever. In the first place, he may, by electing not to sue until the end of the emergency, avoid the provisions of the statute. In the second place, he had no absolute right to a deficiency judgment under established equitable principles (see Point I, *supra*). In the third place, this Court has established that, under certain necessitous circumstances, such impairment of contract as appellant claims to exist is proper under the Constitution.

Block v. Hirsch, 256 U. S. 135.

Marcus Brown Company v. Feldman, 256 U. S. 170.

Lery Leasing Company v. Siegel, 258 U. S. 242.

Home Building & Loan Association v. Blaisdell,
supra.

Richmond Mortgage & Loan Corp. v. Wachovia
Bank, 300 U. S. 127.

In the rent cases cited above, landlords were denied the right to oust tenants at the expiration of their leases, except upon reasonable terms. The right of ouster, which existed at the termination of the tenant's lease *as of a particular date was permanently denied.* The power of ouster under a lease was revived at the termination of the emergency. At the end of the emergency here, Chapter 794 will become inoperative.

POINT III

The judgment of the New York State Court of Appeals should be affirmed.

Respectfully submitted,

JOHN J. BENNETT, JR.,
Attorney General of the
State of New York,
Attorney for Appellees.

HENRY EPSTEIN,
Solicitor General.

JOHN F. X. MCGOHEY,
BENJAMIN HEFFNER,
Assistant Attorneys General,
Of Counsel.

APPENDIX

Commonly Known Facts of the Mortgage Emergency
in New York

TABLE I

Increase in Foreclosures in Borough of Manhattan, New York City,
from 1928-1932¹

Year	Assessed Valuation of Property Foreclosed in Manhattan	Percent of 1928
1928.....	\$ 39,332,000	100.00
1929.....	67,290,000	171.1
1930.....	89,879,500	228.5
1931.....	172,332,000	438.1
1932.....	252,550,500	642.1

¹ Figures compiled by the State Board of Housing (R. & G., July 22, 1933, p. 5).

TABLE II

Types of Property in Foreclosure¹

Type of Property	Percentage of the Assessed Value of Each Type of Property to the Assessed Value of the Total Foreclosed in Manhattan				
	1928	1929	1930	1931	1932
Apartments and Tenements.....	68.7	62.9	61.8	52.8	61.1
Dwellings	4.8	3.2	3.6	2.4	4.2
Hotels	1.3	4.9	3.9	1.7	4.9
Lofts	12.0	15.8	13.0	14.6	12.5
Office Buildings	3.2	1.9	6.5	21.4	8.5
Stores .....	.3	.4	3.2	.5	.8
Theatres and Halls.....	1.5	4.4	1.2	.6	3.1
Garages and Stables.....	2.4	.5	1.1	2.4	.7
Vacant Land .....	.4	.8	.2	.4	.5
Miscellaneous	5.4	5.2	5.5	3.2	3.7
Total.....	100.	100.	100.	100.	100.

¹ Figures compiled by the State Board of Housing (R. & G., September 8, 1934, p. 8).

TABLE III

One Hundred and Forty (140) Foreclosure Actions Brought in the Name of New York Title and Mortgage Company, Plaintiff, for the Period from January 1, 1933, to August 15, 1933, Inclusive

RECAPITULATION

1933		Bids in Foreclosure Sales	Mortgage Debt	Deficiency Judgment	Assessed Valuation for Tax Purposes
January	1st to 31st, incl.	\$120,150	\$1,238,395	\$1,118,245	\$1,516,050
February	1st to 28th, incl.	105,000	1,002,720	897,720	1,349,625
March	Through May 31st	36,500	921,589	885,089	1,067,400
June	Through Aug. 15th	235,900	671,420	435,520	829,500
		<u>\$497,550</u>	<u>\$3,834,124</u>	<u>\$3,336,574</u>	<u>\$4,762,575</u>
Total Due a/c Mortgage Indebtedness			\$3,834,124		
Total Bids at Foreclosure Sales			497,550		
Total Deficiency Judgments				\$3,336,574	

Purchase price of \$497,550 is 12.96% (percent) of total Mortgage Indebtedness

Purchase price of \$497,550 is 10.44% (percent) of Assessed Valuation

		Bids at Foreclosure Sales	Mortgage Debt	Deficiency Judgment	Assessed Valuation for Tax Purposes
Jan.	1933	\$ 1,000	\$ 4,797	\$ 3,797	\$ 4,200
		1,000	4,749	3,749	2,850
		1,000	4,749	3,750	2,850
		2,000	22,967	20,967	32,000
		10,000	145,080	135,080	161,000
		1,000	4,784	3,784	5,000
		1,500	7,765	6,265	10,000
		1,500	7,074	5,574	6,600
		1,500	9,822	8,322	14,000
		1,000	4,182	3,182	4,200
		1,850	10,701	8,851	11,000
		17,550	18,594	1,044	20,000
		1,000	4,470	3,470	4,400

¹ Plaintiff in each of these foreclosure actions was the New York Title & Mortgage Company. The properties bought in by the N. Y. T. & M. Co. were in the names of Land Estates, Inc., and Liberdar Holding Corp., two wholly owned subsidiaries. Records on file at office of N. Y. T. & M. Co., No. 141 Broadway, New York City, N. Y.

TABLE III (continued)

		Bids at Fore- closure Sales	Mortgage Debt	Deficiency Judgment	Assessed Valuation for Tax Purposes
Jan.	1933.....	\$ 800	\$ 7,421	\$ 6,621	\$ 7,200
		950	7,644	6,694	7,000
		1,200	10,759	9,559	13,000
		1,500	9,470	7,970	11,000
		1,000	4,018	3,018	4,200
		2,500	43,130	40,630	55,000
		1,500	9,476	7,976	11,000
		1,500	9,462	7,962	11,000
		1,000	6,188	5,188	9,500
		1,950	16,684	14,734	12,000
		600	4,816	4,216	4,500
		1,000	19,240	18,240	19,700
		1,000	37,689	36,689	50,000
		5,000	85,135	80,135	112,000
		10,000	36,187	26,187	46,000
		1,000	18,020	17,020	25,500
		1,000	25,312	24,312	38,000
		10,000	147,395	137,395	210,000
		1,000	18,362	17,362	45,200
		5,000	64,402	59,402	75,000
		11,000	11,980	980	15,000
		1,000	4,432	3,432	4,600
		1,000	4,397	3,397	4,200
		1,200	8,671	7,471	10,300
		1,200	8,658	7,458	10,200
		1,150	8,661	7,511	10,000
		1,000	4,234	3,234	4,800
		11,000	16,387	5,387	21,000
		100	7,322	7,222	10,000
		100	8,378	8,278	10,000
		100	8,701	8,601	11,000
		100	8,489	8,389	12,000
		100	11,530	11,430	15,000
		100	6,607	6,507	6,900
		100	8,399	8,299	9,500
		100	8,416	8,316	8,500
		100	8,077	7,977	8,000
		100	11,900	11,800	18,000
		100	195,596	195,496	210,000
		100	61,765	61,665	75,000
Feb.	1933.....	10,000	108,814	98,814	125,000
		5,000	104,065	99,065	107,000
		400	4,897	4,497	4,600
		1,100	8,556	7,456	8,000
		650	5,579	4,929	2,775
		650	5,569	4,919	2,775
		650	5,561	4,914	2,750
		650	5,665	5,015	2,800
		10,000	66,843	56,843	33,000
		650	5,616	4,966	2,800
		1,000	37,714	36,714	57,000
		100	8,000	7,900	9,800

TABLE III (continued)

	Bids at Fore- closure Sales	Mortgage Debt	Deficiency Judgment	Assessed Valuation for Tax Purposes
Feb. 1933.....	\$ 100	\$ 13,223	\$ 13,123	\$ 14,000
	2,000	34,494	32,494	43,000
	5,000	119,016	114,016	150,000
	650	5,880	5,230	2,775
	100	9,039	8,939	11,000
	500	1,208	708	3,000
	800	4,517	3,717	4,600
	7,000	14,723	7,723	16,000
	2,000	4,561	2,561	4,600
	10,000	27,195	17,195	30,000
	1,250	7,514	6,264	6,000
	1,000	5,112	4,112	6,100
	750	6,452	5,702	5,500
	2,500	111,085	108,585	120,000
	100	14,828	14,728	17,000
	1,000	56,731	55,731	310,000
	100	4,630	4,530	4,000
	1,000	5,117	4,117	5,500
	1,000	7,291	6,291	7,350
	1,000	7,400	6,400	6,300
	3,000	7,612	4,612	7,000
	7,500	8,647	1,147	11,000
	5,000	12,726	7,726	10,500
	10,000	79,965	69,965	110,000
	1,500	10,823	9,323	12,500
	1,000	6,614	5,614	8,000
	1,000	21,337	20,337	35,000
	1,000	4,704	3,704	4,700
	3,000	9,478	6,478	10,200
	800	4,166	3,366	3,700
	1,500	4,444	2,944	6,000
	1,000	5,306	4,306	8,000
March • 1933.....	100	5,296	5,196	8,500
	100	10,533	10,433	12,500
	1,200	8,232	7,032	7,600
	1,000	12,013	11,013	18,500
	1,500	23,150	21,650	24,000
	5,000	34,615	29,615	43,000
	5,000	39,727	34,727	35,000
	1,000	12,542	11,542	14,000
	1,000	26,744	25,744	20,000
April 1933.....	1,000	24,746	23,746	38,000
May - 1933.....	100	395,795	395,695	390,000
	100	10,944	10,844	13,000
	100	10,466	10,366	13,000
	100	10,436	10,336	13,000
	5,000	119,016	114,016	185,000
	100	10,979	10,879	12,500
	100	9,342	9,242	8,200

TABLE III' (continued)

		Bids at Fore- closure Sales	Mortgage Debt	Deficiency Judgment	Assess- Valuation for Tax Purposes
May	1933.....	\$ 3,000	\$ 30,927	\$ 29,927	\$ 33,000
		100	6,144	6,044	6,500
		2,000	18,072	16,072	41,000
		100	9,342	9,242	8,000
		100	9,189	9,089	10,000
		100	9,340	9,240	8,100
		3,000	12,081	9,081	17,000
		100	10,332	10,232	12,500
		100	10,279	10,179	12,500
		4,000	20,346	16,346	41,000
		1,200	8,590	7,390	7,000
		100	9,398	9,298	9,000
		100	2,973	2,873	6,000
June	1933.....	1,000	9,565	8,565	9,500
		100	7,868	7,768	13,000
		100	4,040	3,940	4,800
30,	.....	5,000	84,677	79,677	95,000
July	1933.....	10,000	182,771	172,771	170,000
		950	4,283	3,333	4,000
		10,000	78,121	68,121	90,000
		200,000	263,657	63,657	410,000
		350	4,539	4,189	3,900
		4,500	4,698	198	4,700
		2,100	13,731	11,631	12,000
Aug.	1933.....	1,800	13,470	11,670	12,000
	Totals.....	\$497,550	\$3,834,124	\$3,336,574	\$4,762,574

TABLE IV

New York Title & Mortgage Company

Foreclosures Resulting in Sales of Properties to Outsiders

Month	Year 1931		Year 1932		Year 1933	
	Units	Amount of Mortgages	Units	Amount of Mortgages	Units	Amount of Mortgages
January	3	\$ 26,000	3	\$ 17,750	3	\$ 30,000
February	3	25,700	2	27,250	0	0
March	5	48,500	3	42,750	1	13,000
April	4	40,250	1	2,000	1	120,000
May	6	57,000	0	0	1	15,000
June	3	18,500	2	10,750	0	0
July	9	360,150	2	359,500	0	0
August	3	24,000	1	4,560	1	32,000
September	3	442,375	1	3,800	1	9,000
October	3	16,250	1	85,000	0	0
November	1	16,500	3	28,400	0	0
December	5	59,725	1	6,000	2	162,000
Total	48	\$ 1,134,950	20	\$ 587,700	10	\$ 381,000

Foreclosures Resulting in Sales of Properties to Mortgage Company or for Account of Holders of Participations in Mortgages

January	28	\$ 3,029,250	67	\$ 2,139,400	155	\$ 6,304,030
February	24	270,800	78	2,402,450	136	4,330,570
March	28	856,400	67	1,706,315	26	1,009,175
April	31	1,933,850	93	3,395,300	20	313,675
May	38	832,410	63	5,510,255	53	811,215
June	19	265,300	94	4,262,700	15	2,941,277.98
July	31	919,650	109	3,847,050	35	11,145,625
August	28	3,918,400	93	4,620,560	10	254,650
September	43	1,378,000	116	3,770,905	16	200,000
October	41	1,875,775	114	9,199,760	17	218,673.93
November	47	1,539,900	111	7,346,395	23	930,800
December	43	516,250	160	6,037,555	16	163,035
Total	401	\$17,335,985	1165 (a)	\$54,238,645	522 (b)	\$28,622,726.91

(a) Includes 155 Units—Mtgcs. \$8,026,245 acquired for a/c Gtd. Holders.

(b) Includes 162 Units—Mtgcs. \$4,269,283.93 acquired for a/c Gtd. Holders.

1 Plaintiff in each of these foreclosure actions was the New York Title & Mortgage Company. The properties bought in by the N. Y. T. & M. Co. were in the names of Land Estates, Inc., and Liberdar Holding Corp., two wholly owned subsidiaries. Records on file at office of N. Y. T. & M. Co., No. 141 Broadway, New York City, N. Y.

TABLE V

Two Hundred and Twenty-three (223) Applications for Deficiency Judgments (Pursuant to Ch. 794, L. 1933) in Mortgage Foreclosure Proceedings from April 1, 1936, to April 1, 1937, in Which the Mortgage Commission of the State of New York was Applicant ¹

Amount of Mortgage	Amount of Deficiency Judgment	Assessed Value
\$ 7,750.	Denied	\$ 9,500.
17,000.	Denied	25,000.
4,000.	\$ 1,185.65	5,000.
11,000.	4,829.51	13,000.
3,750.	Denied	4,200.
4,500.	412.64	5,500.
5,250.	1,443.68	7,700.
6,000.	979.72	5,800.
97,000.	23,192.93	100,000.
2,750.	Denied	4,300.
3,250.	969.57	4,600.
4,750.	546.73	4,900.
4,200.	930.98	2,900.
42,500.	Denied	53,000.
3,500.	Denied	3,800.
36,000.	8,093.45	48,000.
90,000.	90,059.48	74,000.
9,000.	2,923.36	6,600.
28,800.	4,769.95	35,000.
145,500.	23,653.92	175,000.
166,000.	29,009.55	190,000.
186,600.	59,631.00	185,000.
116,400.	88,241.10	135,000.
30,000.	8,592.91	50,000.
85,000.	Denied	89,800.
124,900.	82,194.19	60,500.
11,500.	Denied	9,500.
4,000.	834.00	6,300.
18,000.	Denied	24,000.
85,000.	21,194.90	80,000.
245,000.	65,832.42	245,000.
200,000.	59,879.90	240,000.
10,000.	581.75	11,000.
20,000.	5,290.78	10,500.
60,000.	20,970.67	60,000.
49,000.	17,944.46	55,000.
70,000.	25,309.75	90,000.
4,250.	794.95	4,000.
22,500.	5,598.69	39,200.
16,000.	5,366.22	16,500.

¹ These figures are derived from public records on file in the office of the State Mortgage Commission, 346 Broadway, New York City, N. Y.

TABLE V (continued)

Amount of Mortgage	Amount of Deficiency Judgment	Assessed Value
17,500.	4,371.26	16,500.
14,000.	5,383.12	12,000.
4,200.	2,398.23	2,900.
3,250.	1,679.35	3,800.
3,500.	831.26	4,000.
7,000.	743.88	7,800.
35,000.	Denied	80,000.
150,000.	Denied	153,000.
69,500.	30,508.22	57,000.
27,000.	23,630.13	26,000.
59,250.	Denied	82,000.
90,000.	5,364.43	140,000.
3,750.	2,085.73	4,800.
12,500.	2,307.09	18,500.
35,000.	Denied	55,000.
3,250.	Denied	4,300.
18,000.	746.96	30,000.
5,750.	1,512.26	7,800.
4,500.	754.12	6,600.
4,750.	546.73	7,000.
10,000.	1,305.56	13,000.
5,250.	Denied	7,700.
8,000.	3,279.56	9,000.
2,750.	1,035.61	4,219.
1,900.	519.19	3,000.
8,500.	579.17	10,500.
4,750.	360.72	4,600.
2,400.	695.90	3,600.
3,750.	1,492.26	4,800.
5,750.	1,983.82	6,500.
3,500.	Denied	4,900.
3,250.	300.00	2,500.
3,250.	958.59	3,200.
10,000.	1,382.37	12,500.
12,600.	2,746.32	14,000.
30,000.	Denied	31,000.
4,500.	Denied	2,800.
4,500.	Denied	4,600.
3,500.	Denied	3,600.
2,550.	Denied	5,500.
3,750.	Denied	4,200.
3,750.	Denied	4,800.
6,000.	979.72	9,200.
8,000.	Denied	11,500.
5,500.	1,966.57	7,100.
6,500.	2,168.60	7,100.
18,500.	5,502.23	16,200.
4,250.	1,980.31	4,700.
3,500.	680.30	4,600.
3,500.	1,215.32	6,600.
6,750.	Denied	6,000.
4,500.	847.80	5,000.
4,500.	1,771.99	6,500.

TABLE V (continued)

Amount of Mortgage	Amount of Deficiency Judgment	Assessed Value.
7,250.	2,544.80	8,500.
9,000.	1,473.70	13,500.
6,000.	Denied	9,200.
3,850.	Denied	4,800.
370,000.	114,400.46	325,000.
7,000.	1,819.93	8,500.
4,000.	Denied	3,700.
4,500.	Denied	6,900.
4,000.	Denied	2,900.
15,000.	Denied	
22,500.	Denied	24,000.
4,500.	Denied	5,000.
471,000.	106,651.77	455,000.
3,500.	Denied	4,100.
25,000.	Denied	25,000.
20,000.	2,500.	6,000.
9,550.	Denied	11,000.
5,500.	Denied	7,300.*
3,500.	Denied	4,000.
2,000.	Denied	4,100.
5,750.	2,945.66	8,000.
4,500.	1,164.22	6,300.
250,250.	49,306.34	255,000.
200,000.	41,108.14	200,000.
6,500.	Denied	9,120.
140,000.	Denied	130,000.
3,750.	Denied	4,200.
5,750.	Denied	6,700.
4,750.	Denied	4,600.
7,750.	Denied	9,000.
82,000.	4,711.80	105,000.
130,000.	47,160.83	115,000.
64,050.	33,822.10	87,000.
5,500.	Denied	2,800.
50,000.	8,576.58	60,000.
159,500.	41,155.95	175,000.
4,250.	Denied	3,900.
8,000.	Denied	1,800.
72,000.	Denied	78,000.
4,250.	Denied	3,900.
216,250.	Denied	205,000.
66,500.	15,029.67	36,180.
33,500.	10,552.81	34,000.
4,250.	2,168.59	3,700.
197,000.	47,464.15	242,000.
44,750.	4,892.04	28,800.
6,500.	1,830.15	6,300.
12,500.	Denied	16,000.
12,100.	Denied	8,500.
5,500.	750.00	8,700.
6,000.	1,522.53	8,500.
12,000.	Denied	16,000.

TABLE V (continued)

Amount of Mortgage	Amount of Deficiency Judgment	Assessed Value
7,750.	Denied	9,500.
10,750.	Denied	13,000.
20,000.	Denied	23,000.
35,000.	Denied	37,000.
6,000.	309.27	8,500.
9,000.	Denied	13,000.
3,500.	Denied	4,600.
4,250.	229.04	4,500.
4,500.	700.88	4,600.
4,750.	Denied	5,000.
3,500.	Denied	4,400.
4,750.	Denied	5,000.
5,500.	Denied	2,800.
3,250.	Denied	3,700.
3,500.	1,710.48	4,000.
4,750.	255.75	5,000.
3,850.	2,297.55	4,600.
32,500.	9,135.42	35,000.
6,000.	Denied	9,400.
3,250.	738.99	3,200.
11,000.	4,809.23	13,000.
14,500.	2,730.01	17,000.
3,750.	1,669.22	5,800.
27,000.	11,179.62	33,000.
4,250.	2,285.50	5,600.
3,750.	604.10	5,800.
3,750.	347.88	4,800.
3,750.	294.05	4,300.
5,750.	1,425.46	5,500.
4,500.	1,115.22	4,600.
3,500.	729.23	3,900.
3,250.	Denied	3,500.
62,500.	16,870.37	64,000.
272,250.	156,984.67	274,000.
3,750.	1,629.02	3,600.
7,500.	3,657.55	9,700.
7,500.	Denied	9,800.
18,000.	Denied	22,000.
15,000.	Denied	17,000.
5,500.	1,380.12	7,100.
3,750.	Denied	3,400.
7,500.	4,183.25	5,200.
9,000.	1,845.18	10,500.
2,200.	1,905.71	2,700.
250,250.	23,875.41	255,000.
640,000.	317,793.68	670,000.
89,000.	15,189.70	55,000.
	L. 118	56,000.
70,000.	35,152.95	85,000.
35,000.	5,585.31	32,000.
95,000.	22,764.85	115,000.
598,000.	170,867.73	550,000.

TABLE V (continued)

Amount of Mortgage	Amount of Deficiency Judgment	Assessed Value
250,250.	19,554.17	255,000.
250,250.	54,027.75	255,000.
186,600.	46,995.65	185,000.
30,000.	5,564.43	18,400.
20,000.	5,749.08	19,000.
3,750.	361.54	3,800.
185,800.	80,867.05	200,000.
141,250.	20,588.55	145,000.
3,750.	590.21	4,100.
4,250.	26.04	6,400.
14,875.	4,970.04	15,000.
6,750.	859.14	6,000.
6,750.	10,207.58	55,000.
4,500.	1,582.03	4,400.
12,000.	897.90	9,000.
65,000.	9,250.94	65,000.
4,250.	869.37	3,700.
7,750.	748.53	9,500.
20,000.	7,082.00	24,000.
12,000.	2,055.14	12,000.
27,000.	19,784.21	38,000.
4,250.	1,114.14	5,700.
75,000.	10,461.53	54,425.
9,000.	5,647.56	10,000.
30,000.	4,905.37	33,000.
10,500.	3,974.74	10,000.

(7682)

CASE PRESS, INC., 9 Murray St., N. Y.

222

SUPREME COURT OF THE UNITED STATES.

No. 465.—OCTOBER TERM, 1938.

Robert B. Honeyman, Appellant,	} Appeal from the Supreme Court of the State of New York.
vs.	
David B. Jacobs and Mary V. Jacobs.	

[April 17, 1939.]

Mr. Chief Justice HUGHES delivered the opinion of the Court.

This case, coming here on appeal from the state court, presents the question of the validity under the contract clause of the Federal Constitution of Section 1083-a of the Civil Practice Act of New York (Chapter 794 of the Laws of 1933)¹ under which the appellant, a mortgagee of real property, was denied a deficiency judgment in a foreclosure suit, where the state court found that the value of the property purchased by the mortgagee at the foreclosure sale was equal to the debt secured by the mortgage.

The mortgage was executed in February, 1928, that is, prior to the legislation in question, to secure a bond for \$15,000, with in-

¹ Section 1083-a, provides:

"1083-a. *Limitation Upon Deficiency Judgments During Emergency Period.*—No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where the mortgaged property shall be sold during the emergency, except as herein provided. Simultaneously with the making of a motion for an order confirming the sale or in any event within ninety days after the date of the sale, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus cost and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist".

terest, payable in February, 1931. On default in payment, appellant, the holder of the bond and mortgage, brought suit for foreclosure and judgment for foreclosure and sale was entered in April, 1938. The property was then sold to appellant for the sum of \$7500. In the referee's report of sale the amount due on the bond and mortgage was stated to be \$15,771.17, and the taxes, fees and expenses amounted to \$1319.03, leaving a deficiency of \$9590.20.

Section 1083-a of the Civil Practice Act required that the right to a deficiency judgment should be determined in the foreclosure suit. *Honeyman v. Hanan*, 275 N. Y. 382; 302 U. S. 375, 378. Accordingly, appellant made his motion in that suit to confirm the sale and for deficiency judgment. Proof was submitted to the court that the present value of the property was \$25,318. It does not appear that the correctness of this valuation was contested. The court thereupon confirmed the sale and denied the motion for deficiency judgment upon the ground "that the value of the property is equal to the debt of the plaintiff". Appellant's contention that Section 1083-a as thus applied violated the contract clause of the Constitution was overruled and this ruling was sustained by the Court of Appeals. 278 N. Y. 467. The court followed its earlier decisions, citing *Honeyman v. Hanan*, 275 N. Y. 382; *Klinke v. Samuels*, 264 N. Y. 144; *City Bank Farmers Trust Co. v. Ardlea Corporation*, 267 N. Y. 224.

Appellant invokes the principle that the obligation of a contract is impaired by subsequent legislation which under the form of modifying the remedy impairs substantial rights. See *Sturges v. Crowninshield*, 4 Wheat, 122, 200; *Von Hoffman v. City of Quincy*, 4 Wall. 535, 553, 554; *Antoni v. Greenhow*, 107 U. S. 769, 775; *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, 430, 434, and cases cited, note 13; *W. B. Worthen Co. v. Thomas*, 292 U. S. 426, 433; *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56, 60. As we said in *Richmond Mortgage Corporation v. Wachovia Bank*, 300 U. S. 124, 128, "The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right".

We have heretofore decided that the requirement of Section 1083-a that the right to a deficiency judgment must be determined in the foreclosure suit raises no substantial question under the con-

tract clause. *Honeyman v. Hanan*, 302 U. S. at p. 378. The question is whether in the instant case the denial of a deficiency judgment substantially impaired appellant's contract right. The bond provided for the payment to him of \$15,000 with the stipulated interest. The mortgage was executed to secure payment of that indebtedness. The contract contemplated that the mortgagee should make himself whole, if necessary, out of the security but not that he should be enriched at the expense of the debtor or realize more than what would repay the debt with the costs and expenses of the suit. Having a total debt of \$15,771.17, with expenses, etc., of \$1319.03, appellant has obtained through his foreclosure suit the property of the debtor found without question to be worth over \$25,000. He has that in hand. We know of no principle which entitles him to receive anything more. Assuming that the statute before its amendment permitted a recovery of an additional amount through a so-called deficiency judgment, we cannot say that there was any constitutional sanction for such a provision which precluded the legislature from changing it so as to confine the creditor to securing the satisfaction of his entire debt.

Section 1083-a in substance assured to the court the exercise of its appropriate equitable powers. By the normal exercise of these powers, a court of equity in a foreclosure suit would have full authority to fix the terms and time of the foreclosure sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or the price bid was inadequate. *Home Building & Loan Association v. Blaisdell*, *supra*, at pp. 446, 447, and cases cited, note 18. *Richmond Mortgage Corporation v. Wachovia Bank*, *supra*, at p. 129. In this control over the foreclosure sale under its decree, the court could consider and determine the value of the property sold to the mortgagee and what the mortgagee would thus realize upon the mortgage debt if the sale were confirmed. See *Monaghan v. May*, 242 App. Div. N. Y. 64, 67; *Guaranteed Title & Mortgage Co. v. Scheffres*, 247 App. Div. N. Y. 294.

The reasoning of this Court in *Richmond Mortgage Corporation v. Wachovia Bank*, *supra*, is applicable and governs our decision. There, a statute of North Carolina, enacted after the execution of notes secured by a deed of trust, provided that where a mortgagee caused the sale of mortgaged property by a trustee and, becoming the purchaser for a sum less than the amount of the debt, thereafter brought an action for a deficiency, the defendant was entitled


to show, by way of defense and set-off, that the property sold was fairly worth the amount of the debt or that the sum bid was substantially less than the true value of the property, and thus defeat the claim in whole or in part. Under the former law of that State, when the mortgagee became the purchaser at the trustee's sale under a power in the deed of trust, he might thereafter in an action at law recover the difference between the price he had bid and the amount of the indebtedness. We found that the other remedy by bill in equity to foreclose the mortgage was still available. And that in such a proceeding the chancellor could set aside the sale if the price bid was inadequate, and, in addition, he might award a money decree for the amount by which the avails of the sale fell below the amount of the indebtedness but that "his decree in that behalf would be governed by well-understood principles of equity". The Court was of the opinion that the statute modifying one of the existing remedies for realizing the value of the security could not "fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full". The act recognized the obligation of his contract and his right to its full enforcement but limited that right "so as to prevent his obtaining more than his due. By the old and well known remedy of foreclosure, a mortgagee was so limited because of the chancellor's control of the proceeding". That "classical method" of realization upon a mortgage security through a foreclosure suit had always been understood "to be fair to both parties to the contract and to afford an adequate remedy to the mortgagee". In that view it appeared that the new law as to proceedings for a deficiency judgment after the exercise of a power of sale "merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity". And that did "not impair the obligation of the contract".

We reach a similar result here upon the same ground—that under the finding of the state court the mortgagee has obtained satisfaction of his debt and that the denial by the statute of a further recovery does not violate the constitutional provision.

The judgment is affirmed.

Affirmed.

MICRO CARD 22

TRADE MARK 



MICROCARD[®]
EDITIONS, INC.

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

520²

38

1
69

